THE ANTITRUST IMPROVEMENTS ACT OF 1975

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
ANTITRUST AND MONOPOLY

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

S. 1284

A BILL TO IMPROVE AND FACILITATE THE EXPEDITIOUS AND EFFECTIVE ENFORCEMENT OF THE ANTITRUST LAWS

PART 1

MAY 7 AND 8, JUNE 3, 4, AND 12, 1975

Printed for the use of the Committee on the Judiciary
(Pursuant to S. Res. 72, Sec. 4)

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WEDNESDAY, MAY 7, 1975

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Mr. Hyland reiterates that New Jersey supports S. 1284 and S. 1637 with some minor changes, as well as the other parens patriae legislation currently pending before the subcommittee — 239
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Section 4C(a)(1), which gives the courts discretion to refashion a suit brought as a parens patriae action into a class action, should be reworded to specifically direct the court to designate the State attorney general as the representative of "a class or classes" if the character of the action is changed to a class action; otherwise, the attorney general would lose control of the litigation — 248
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Courts should not be permitted to dilute the consumer remedy provided by the parens patriae concept by fashioning parens patriae actions into class actions; however, the parens patriae concept is not necessary with respect to political subdivisions of a State and the attorney general should be able to file a suit as a "'representative of a class' on behalf of any and all political subdivisions"	287
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[End of prepared statement]	
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Statement of Professor Milton Handler, Representing the Firm of Kay, Scholer, Fierman, Hays & Handler (New York) ---------- 291

Professor Handler's oral testimony closely followed his prepared statement.

[Prepared statement]

Professor Handler opposes the provision in S. 1284 that would allow the use of nolo contendere pleas as prima facie evidence in subsequent civil antitrust litigation, primarily because the effect—reducing the number of antitrust suits concluded by nolo pleas—would require a substantial increase in the number of judges to hear lengthy antitrust cases and a corresponding increase in the judicial structure (courts, ancillary personnel, etc.); further, the existence of liberal rules of evidence regarding discovery means that the provision will not be as useful to treble damage litigants as is claimed ---------- 300

What the nolo provision would do, "contrary to the purpose of the omnibus bill, is to impede the administration and enforcement of antitrust by compelling the trial of most criminal cases without any real compensating advantage to anyone" ---------- 301

Title IV, parens patriae, rests on "dubious and unsound" premises ---------- 301

Unless a person excludes himself from an action proposed by the State, he is totally denied the treble damage remedy now existent in the antitrust laws, a situation that (1) will smother the stimulus and impetus for effective antitrust enforcement, (2) "is the most radical change in the antitrust laws since their original enactment" because it removes the federal right of action currently embodied in those laws, and (3) would probably not increase the efficiency of antitrust enforcement because it would treat "the various types of businessmen who are affected by antitrust violations * * * like paupers, lunatics, and the other kinds of persons for whom the States normally act as parens patriae" ---------- 302

Even limiting parens patriae suits to those on behalf of individual consumers presents problems such as those encountered when the original antitrust violation damages the first person in marketing chain and it is difficult or impossible to determine whether any person farther down the chain has been injured, to what extent, and whether the original violation was the proximate cause of the ultimate injury, if any ---------- 302

The subcommittee should consider carefully whether it would be wise to overturn established precedents concerning proximate cause ---------- 302

The "fluid recovery" or aggregate damages provision "is plainly unconstitutional" in that it allows the plaintiff to dispense with the exact computation of damages and "gives legislative sanction to a process of sheer guesswork which when quantified can inflict irreparable harm to our economy"; such a process, which distorts the meaning of the word "compensation," is a classic case of "throwing the baby out with the bathwater" ---------- 303

The parens patriae bill (H.R. 38) pending before the House would extend the aggregate damages concept beyond parens patriae suits to all antitrust actions certified as class actions under rule 23 of the Federal Rules of Evidence ---------- 303

The vast majority of class action antitrust suits are brought, not by consumers, but by businessmen (such as franchisees) who are more than capable of making the effort to prove their damages; to allow one to share, on a pro rata basis, in some estimated damage award irrespective of whether he in fact suffered any injury would amount to punishment of the alleged violator while not necessarily amounting to compensation of the businessman ---------- 303

During a time of recession, it would be especially unwise to impose the kind of conditions on large business enterprises that could result in bankrupting the "principal source of employment in this country" ---------- 303

It is not possible to ascertain any provable amount of damage to the general economy of a State, but H.R. 38 defines the proof in terms that were specifically rejected in *Hawaii* v. *Standard Oil* ---------- 304

There is no way, despite the bill's prohibition against duplicative recovery, to avoid such recovery where there need be no proof of individual damages in parens patriae actions ---------- 304

Professor Handler questions the wisdom or necessity of conferring upon State attorneys general the powers to enforce Federal laws, and of compensating special counsel at a rate other than that paid to the State attorney general ---------- 304

The first section of the Bayh amendment to S. 1284, which would make it a felony, with penalties of up to $1 million and 3 years' imprisonment, to engage in "undefined criminal or fraudulent conduct with the specific intent of excluding or contributing to the exclusion of another from any commercial activity," would do away with the "dangerous probability" requirement of monopolization in section 2 (Sherman Act) attempt cases, a requirement that has been judicially approved since Justice Holmes' "landmark" opinion in *Swift & Co.* v. *U.S.* (196 U.S. 375 (1905)), and recently characterized by Donald Turner, former Chief of the Antitrust Division of the Department of Justice, as constituting "good sense"; the amendment would punish intent rather than for any unlawful consequences ---- Page 304

The second section of the Bayh amendment, which would require corporations guilty of any Sherman Act violation to forfeit 20 percent of their gross revenues during the period of the violation to the Government, is particularly perplexing in that the penalty is likely to bear absolutely no relation to the unlawful conduct—i.e., the 20 percent figure applies for per se offenses and also for "trival or obscure" offenses "regardless of how insignificant [their] effect on competition" ---- 305

If the "findings" set out in section 102(a) that, among other things, increased concentration has contributed to our present high rate of inflation, were subject to judicial review, they would almost certainly be set aside as "clearly erroneous and without foundation"; they are "hyperbolic rhetoric" ---- 306

Based on years of experience as both plaintiffs' and defendants' counsel in complex antitrust cases, on 45 years of teaching experience in the area of antitrust law, and on extensive work with the Antitrust Division, Mr. Handler states that he is "constrained to voice [his] firm opposition to the provisions of" S. 1284 cited above ---- 306

[End prepared statement]

Senator Hart orders printed in the hearing record an as yet unpublished paper (not available) presented by Professor Handler at the 1975 law alumni symposium at Columbia University Law School ---- 299

In response to a question from Senator Hart, Professor Handler states that an expert in the area of inflation-concentration figures, "finds less inflation in the concentrated industries than the competitor" ---- 299

Professor Handler states that in order to be acceptable, S. 1284 (particularly title IV) must be limited to consumers, that suits should be brought by the Attorney General or the Federal Trade Commission, and that where either plaintiff has certified that consumers have been injured, monies received should be distributed to consumers ---- 300

Statement of Jerome Shapiro, partner, Hughes, Hubbard & Reed (New York), on behalf of Bristol-Meyers Co. Mr. Shapiro's oral testimony was based substantially on his prepared statement ---- 307

[Prepared statement]

The means chosen in S. 1284 to deprive the antitrust violator of the fruits of his misconduct will not achieve their objective, primarily because the means "would be subject to substantial existing and new legal obstacles"; in addition, the majority of consumers will not claim their pro rata shares of damage awards, so a better way to achieve the desired end would be to create a new cause of action on behalf of the Government, a cause of action that would not be subject to the difficulties inherent in the parens patriae action ---- 316

Mr. Shapiro assumes, for purposes of his statement, (1) that actions brought pursuant to proposed section 4C.(a)(2) would still need to meet the substantive requirements of section 4 of the Clayton Act, i.e., that there has been injury to the business or property of the plaintiff, and (2) that title IV is not intended to result in duplicative recovery ---- 317

Whether parens patriae cases brought pursuant to sections 4C. (a)(1) and 4C. (c) would meet the "manageability" criterion of rule 23 is doubtful; it is likely that there would be a need for separate, individual proof of damages by members of the class represented, as to each plaintiff's claim; in *Eisen* v. *Carlisle & Jacquelin* (479 F. 2d 1005 (2d Cir 1973)), the Second Circuit found the need for such separate proof under section 4 of the Clayton Act, and Mr. Shapiro states that he knows of no circuit that has held to the contrary, and suggests that the Supreme Court will ratify the individual proof concept whenever it reaches the question ---- 317

Several cases, including *Zahn* v. *International Paper Co.* (414 U.S. 291 (1973)), have held that in a class action, each member must satisfy the jurisdictional amount that is a prerequisite for certain types of litigation in the Federal courts; while section 4 of the Clayton Act does not contain any jurisdictional amount, title IV retains the section's standard of "injury to business or property," meaning that it is likely that courts would require the same kind of individual proof of damages that is required in the aggregation of damages where there is a jurisdictional amount; in fact, in *Eisen* (supra), the Second Circuit held that it would be an unconstitutional violation of the due process clause to allow the assessment of aggregate damages under section 4 ---- Page 317

Mr. Shapiro analyses a hypothetical major price-fixing case, in relation to the probable effects of title IV of S. 1284 ---- 318

The State attorney general would be representing, in a hypothetical case involving a prescription drug, individual consumers who made purchases through a retail druggist, as well as the retailers and/or wholesalers who had made purchases directly from the defendants; this situation would pose technical problems with constitutional significance ---- 318

The "passing on" problem in a marketing chain where there are several purchasers complicates the proof of each consumer, who must show that he paid a higher price, not only as the result of the prior consumer's natural mark-up, but because the party from whom he purchased did not absorb the overcharge resulting from the price-fixing violation and therefore included that overcharge in his mark-up to subsequent purchasers ---- 319

At least two cases have held that in a situation where the original purchaser did not resell pursuant to a cost-plus contract, only the original purchaser may recover damages for the overcharge (*Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), *Donson Stores, Inc.* v. *American Bakeries Co.*, 58 F.R.D. 481 (DC SNY 1973)) ---- 319

The passing on problem highlights two basic difficulties inherent in S. 1284: first, although section 4C(c) permits recovery of damages in the aggregate without the need to prove individual damages, in fact, there would be a need to prove such individual injury in order to determine who in the marketing chain had actually been unlawfully overcharged; second, the attorney general would be faced with a conflict of interest problem arising from the definition of "persons" to include individuals and corporations, because the interests of retailers and individual consumers are not likely to be identical. One probable result of such a situation is that any judgment against individual consumers (assuming the attorney general had opted to present the case for the retailers) would be constitutionally unable to be given res judicata effect; there is also a potential conflict between an action brought by the attorney general pursuant to section 4C(a)(1) on behalf of retailers and a suit brought pursuant to section 4E, which allows recovery by the State for overcharges in a federally funded State welfare program ---- 319

Mr. Shapiro discusses the difficulties of ascertaining who has standing, under section 4 of the Clayton Act, to sue for injury onjaccount of alleged antitrust violations, and the difficulties an attorney general would face in arguing on behalf of the rights of two potentially incompatible groups; i.e., individual consumers and direct purchasers, or retailers or wholesalers ---- 320

If the individual consumer does not have standing to sue under section 4, then the retailers or wholesalers will keep it in its entirety, meaning that individual consumers would receive no part of any damage allocation ---- 320

Title IV of S. 1284 does not reach the threshold question of who has standing to sue because an attorney general is authorized to sue on behalf of persons "who have been damaged" while section 4 of the Clayton Act permits suits only by persons who have been damaged "by reason of" anything forbidden in the antitrust laws ---- 320

Under most of the judicial tests for standing, the individual consumer (or indirect purchaser) would not likely be found to have an assertable claim: some courts have held that existence of an intermediary between the seller and the ultimate consumer negates the requisite privity be-between them; the Second Circuit has stated that no one not in the "target area" of the defendant's conduct has standing to sue; the Tenth Circuit has formulated a test similar to that used in the Second Circuit; only in the Ninth Circuit, which has articulated a "target-area" broad enough to include "plaintiffs foreseeably injured" by a defendant's conduct, would the individual consumer possibly have access to the courts ---- Page 320

In *GAF Corp.* v. *Circle Floor Co., Inc.*, 463 F. 2d 752 (2d Cir. 1972), the court refused to hear a claim for damages by a party the court felt had suffered consequential as opposed to direct injury ---- 321

As S. 1284 and the proposed amendments to it are drafted, "the attorney general would probably argue unsuccessfully that his individual consumer clients and all of his retailer clients have standing, and he would end up with only wholesaler and direct-purchasing retailer clients, on whose behalf he should have been arguing that his individual consumers clients and his indirect-purchasing clients lack standing" ---- 321

Mr. Shapiro analyzes a hypothetical exclusionary conduct case, in relation to the probable effect of title IV ---- 322

In an exclusionary conduct case, she attorney general would be suing, as parens patriae, on behalf of three plaintiffs—the potential competitor who was excluded from the market by the defendants' price-fixing behavior; the supermarkets, drug stores, etc., who were not able to stock and sell the excluded competitor's products; and consumers who were forced to purchase other brands than those of the excluded competitor and at probably higher prices ---- 322

Every problem involved in the hypothetical price-fixing case mentioned above (i.e., passing-on, standing) would be present in the exclusionary conduct case; in addition, there is an additional problem—the fact that there would be no "illegal" price involved ---- 322

As indicated by the Second Circuit in *GAF* and the Supreme Court in *Hanover Shoe* (both cited supra), probably the only valid cause of action would be one by the excluded competitor, assuming that no one else could prove direct damage; in other words, no consumer would have a valid cause of action, except in the case where there had been direct purchases: in *Hanover Shoe,* the Court found that despite illegal exclusionary conduct by United Shoe Machinery in the leasing rather than sale of its machinery, Hanover could only recover, under section 4 of the Clayton Act, if the price it paid United was itself illegal, not merely higher than it would have been absent any illegal conduct ---- 322

Under both *GAF* and *Hanover Shoe,* the attorney general could only represent corporate or business interests, which Mr. Shapiro posits would be contrary to what S. 1284 contemplates ---- 324

The problem with confining the "persons" to be represented by the attorney general to "natural persons" is that many business interests are in fact natural persons, while many individuals have chosen to use the corporate form ---- 324

The notice provision in section 4C. (b)(1), which attempts to negate the Supreme Court ruling in *Eisen* v. *Carlisle & Jacquelin* (417 U.S. 156 (1974), "is doubtful [constitutional] validity" in that it fails to recognize the Court's observation that notice by publication is a highly unreliable means of notifying interested parties that their rights are before the court; for that reason, there could well be required re-litigation because courts could refuse to give binding effect to judgments affecting parties who had failed to "opt out" of parens patriae or class action litigation ---- 324

[End prepared statement]

Mr. Shapiro briefly summarizes his prepared statement ---- 300

Citing an antitrust action against Packard, in which he was personally involved, Mr. Shapiro emphasizes that a primary defect in title IV is that it would impose the same sanctions (possibly involving exposure to excessive financial liability) on activity pursued innocently or to effectuate reasonable business judgment as it would to activity followed as a consequence of "a vicious, backroom, secret, deliberate, code-using, price-fixing conspiracy" ---- 311

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Mr. Shapiro suggest that, in lieu of actions on behalf of consumers (indirect purchasers), there be a cause of action in favor of the Government, to impose a fine whose rationale would be reduction of "unjust enrichment" on the part of an antitrust violator; the amount of damages could, in the discretion of the trial judge, be single, double or treble—depending on the severity of the violation; attorneys general could also be endowed, via a qui tam type statute, with the authority to sue ex rel United States to recover a portion of the damages	313
In response to questions from Bernard Nash, Assistant Counsel to the subcommittee, Mr. Shapiro conceded that there is currently a division among the circuits concerning the person(s) entitled to recovery, but indicated that he would predict that the Supreme Court will eventually decide in favor of the Second Circuit's "target area" test	315
Any substantive modifications of section 4 of the Clayton Act would have to be made effective retrospectively	315
Statement of David I. Shapiro, partner, Dickstein, Shapiro & Morin, Washington, D.C	325
Mr. Shapiro's oral testimony was based substantially on his prepared statement.	
[Prepared statement]	
Mr. Shapiro generally supports S. 1284; he wholeheartedly endorses title IV and would suggest an alternative to title VI (nolo contendere) to achieve the same end	339
Currently, antitrust violators are immune from suit by individual consumers unless they have records to support their claims, and States may sue as representatives in class actions only if they (States) have made or financed purchases of the products in question; further, actual damage awards are limited to the amounts claimed by persons with the knowledge and sophistication needed for the presentation of individual claims	339
Title IV, which would permit States to recover aggregate damages on behalf of consumers and to use any recoveries in excess of those claimed in the furtherance of their antitrust enforcement activities, would not only protect consumers but also assist States in their growing enforcement roles; States have been judicially recognized as "ideal consumer representatives"	339
Corporations should be excluded from the persons on whose behalf states could sue as parens patriae; the legislation should make clear that only "natural persons acting in their roles as consumers" are to be included within the definition	339
Mr. Shapiro would delete the provision for suits on behalf of political subdivisions; there is adequate law to protect their interests	340
Section 4C.(a)(1) is the "legislation and rulemaking" that the Ninth Circuit referred to when it refused to permit the State of California to sue as parens patriae on behalf of consumers in *California* v. *Frito-Lay, Inc.* (474 F. 2d 774, cert. denied, 415 U.S. 908 (1973)	340
In the absence of legislation such as that embodied in section 4C(a)(1), price-fixers who perpetrate a series of individually small injuries to a wide cross-section of consumers will be able to retain the fruits of their "perfect crime"	340
While he supports the provision for suit by a state for damages to its general economy, Mr. Shapiro recommends adopting the limiting language currently embodied in H.R. 6786, that such damage be limited to measurable and actual decrease in revenues or increase of expenditures or both	340
Citing the *Air Pollution* Cases (481 F. 2d 122 (9th Cir. 1973)), Mr. Shapiro contends that the limitation he proposes would not merely reiterate the right a state already has to sue for injuries suffered "in its capacity of a consumer of goods and services": in the Air Pollution cases, the State of California was not allowed to recover for injury to its tax base because increasing air pollution directly attributable to defendants' conspiracy had resulted in business decisions not to locate in the Los Angeles area and to leave the State	340

In agreement with the administration (testimony of Thomas Kauper), Mr. Shapiro advocates not permitting the dilution of the consumer remedy in parens patriae by allowing courts to transform the actions into class actions ---------- Page 341
The notice requirement for parens patriae actions should be made the same as it currently is for rule 23 class actions ---------- 341
Eisen did not detract from the publication method of notice; that case merely addressed the instance where the names and addresses of the class members "happened to be available"; the Court did not say that the Constitution required individual notice in all cases; due process may be satisfied with a lesser notice ---------- 341
As in the *Antibotics* cases, it is unlikely that even a "reasonable effort" would uncover the names of all affected consumers; there are not generally records of the consumers of anything except, perhaps, "big ticket" items such as automobiles ---------- 341
The legislative history of a notice requirement such as the one advocated should clarify the fact that the notice requirement is being made comparable to that in rule 23 "to eliminate any conceivable constitutional objection in that rare case in which consumers' can be identified through 'reasonable effort'." ---------- 341
There is nothing inherently unfair about using the aggregate damages to a class of consumers rather than the provable damages of indivdual consumers: in *Frito-Lay*, the Ninth Circuit encouraged the State of California to obtain the recovery it was seeking (and the court felt it could not award) from Congress ---------- 342
Section 4C(c)(1) should be modified so that damages may be proved in the aggregate by use of statistical or sampling means or "such other reasonable system of estimating damages as the court in its discretion may permit, without the necessity of separately proving the fact or amount of damage * * *." ---------- 342
There is adequate authority for permitting the estimation of damages, once the fact of injury has been proved ---------- 342
Mr. Shapiro gives several examples of expenditures by the states of amounts in excess of a distributed "fluid recovery" damage award stemming from litigation in *State of West Virginia* v. *Chas. Pfizer, Inc.* (314 F. Supp. 710 (D. SNY (1970), aff'd 440 F. 2d 1079 (2d Cir.), cert. denied 404 U.S. 871 (1971)); in that case, 40,000 consumers in 43 states filed claims against a consumer fund totalling $30 million ---------- 343
Mr. Shapiro opposes sections 4D and 4E, which would require the bringing of actions by the Attorney General of the United States if the State general did not ---------- 343
Giving nolo contendere pleas prima facie effect in subsequent civil litigation would discourage the use of such pleas, an undesirable effect; Mr. Shapiro suggests leaving the present nolo provision in the Clayton Act as it is, but adding language to the effect that the fruits of the Government's investigation be made available to the States, even to the point of making grand jury testimony available on the theory that the traditional notions of grand jury secrecy have no relevance in an antitrust action ---------- 344
Appendix: sets forth Mr. Shapiro's suggested revisions to S. 1284.
[End prepared statement]

Mr. Shapiro presents his oral testimony based on his prepared statement ---------- 325
In response to a question from Mr. O'Leary, staff director and chief counsel to the subcommittee, Mr. Shapiro asserts that so far as he knows there is no "responsible" opinion to the effect that a "fluid recovery" damage award violates due process considerations; the Second Circuit opinion in *Eisen*, which found fault with a "fluid recovery" damage award, was vacated ---------- 330
In the antibiotic settlement, where the recovery was based on defendants' records indicating overcharges, and individual claimants were sought subsequent to settlement, there was an objection made to the constitutionality of such a solution, but the court rejected the argument ---------- 330
The margin of error, between what consumers claimed in the antibiotics settlement and what a field audit indicated were valid claims, was 7 percent ---------- 331
There is no due process problem with an administrative distribution ---------- 332

Mr. Shapiro states that his contingent fee arrangement with the States involved in the tetracycline litigation was 15 percent of the recovery, subject to court approval—but that the court approved a lesser amount.

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The contingent fee arrangement actually produced less income for the firm than would a straight pay-as-you-go hourly rate	332
Contingent fees are necessary, because with the exception of perhaps one or two States, States do not have the money to hire counsel on an hourly basis, despite the fact that plaintiffs' counsel would generally prefer to be hired on an hourly basis, as are defendants' counsel	332
In the air pollution litigation, which plaintiffs lost, Mr. Shapiro's firm received only out-of-pocket expenses, and no compensation for either the salaries of the lawyers who spent 3 years working on the case, or for overhead	332
Mr. Chumbris, Minority Chief Counsel, making a point for Senator Hruska, expressed the feeling that if States are to be given the power to enforce the antitrust laws, they should hire experienced antitrust lawyers to head their enforcement divisions, in the same way that the Federal Government hires attorneys from private practice to head such agencies as the Federal Trade Commission, or divisions within the Treasury Department; then there would be no need for outside counsel and contingent fee arrangements	333
Mr. Shapiro, in reply, notes that major antitrust actions may continue for up to or in excess of 10 years, and that it would be nearly impossible to find a private attorney willing to give up his practice for that period of time, and concludes that if the States are to be able to hire the same caliber legal talent as private defendants employ, it is necessary that they be able to hire outside counsel on the contingency that they will be paid only if they win	334
Mr. Chumbris notes that if Congress enacts legislation to give State attorneys general the powers embodied in S. 1284 it will have to realize that the offices will not have sufficient time and expertise to handle antitrust matters without the benefit of outside counsel, and decide the wisdom of parens patriae provisions in that light	335
Mr. Shapiro, in answer in a question from Mr. Nash concerning the constitutionality of title IV, which he says does not authorize a State attorney general to sue on behalf of persons similarly situated (as class action plaintiffs do), but rather conditions the filing of a suit by the attorney general on distribution of recovery to consumers, replies that he sees no constitutional infirmities in title IV; title IV merely creates a new and in his view, desirable, cause of action on behalf of the States	336
In answer to Mr. Nash's question concerning the burden of proof by the plaintiff consumers, Mr. Shapiro replies that it will be unchanged and the proof of estimated aggregated damages is likely to be more accurate and less speculative than pooof of individual damages added up	337
Mr. Shapiro discusses the notice aspect of the *Eisen* decision, and says that the holding was based on the literal language of rule 23(c)(2) and not on constitutional, due process grounds	337
Senator Hart recesses the proceedings	338

WEDNESDAY, JUNE 4, 1975

Senator Philip Hart, chairman of the Subcommittee on Antitrust and Monopoly, calls subcommittee to order and welcomes Mayor Joseph Alioto of San Francisco	347
Statement of Joseph L. Alioto, mayor of San Francisco, Calif., on behalf of the Conference of Mayors. Mayor Alioto submitted a prepared statement for the record	347

[Prepared statement.]

The plethora of antitrust decisions from U.S. Federal courts has placed enforcement procedures in a zone of confusion and it is appropriate that this confusion be dissolved by legislative pronouncements	363
Hawaii v. *Standard Oil Co. of California* is discussed and its effect described as depriving the private attorneys general of an effective tool to fight collusion on the pricing of consumer goods thus lessening antitrust policy of the United States	363

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Standing to sue in the capacity of parens patriae must be granted to dilute the effects of *Hawaii* v. *Standard Oil* 363
Procedural rules relating to class action do not make parens patriae unnecessary since the courts are rejecting many motions for class action 363
The Hart bill would close a conspicuous loophole which would allow price-fixing companies to retain the bulk of the revenue they extracted unlawfully from the consuming public 363
Failure to eanact the Hart amendment to the antitrust laws leaves antitrust malefactors with huge windfalls when their collusive price activities cover a multitude of persons 364
Senator Hart's amendment would also rectify a judicial error of long standing relating to pleas of nolo contendere. A nolo contendere plea enables collusive price fixers to escape the damages they have caused consumers, and results in long civil trials which have discouraged private claimants from prosecuting legitimate grievances. There is no difference between a plea of guilty and a plea of nolo contendere and therefore there should be no difference between the two pleas with regard to antitrust enforcement 364
[End prepared statement]

Cities have a very vital interest in the enforcement of the antitrust laws, and, therefore, the powers S. 1284 would give to State attorneys general to bring actions should be given also to corporation counsel and city attorneys 347
S. 1284 is "one of the great pieces of antitrust literature written from the standpoint of the victims of monopoly" 348
Prosecution of the electrical cases, on behalf of people fighting monopolies that affected widespread classifications of classes of people, represented a "real watershed of the turn of the private antitrust actions to respectability" 348
Mayor Alioto states that he will discuss parens patriae 349
In discussing the *Hawaii* v. *Standard Oil* case, Mayor Alioto says that he advised the attorney general of Hawaii that based on the seemingly unfounded price differential between the cost of petroleum on the west coast and in Hawaii, and "other evidence of what looked to us like collaborated activity," the State of Hawaii probably "had a lawsuit" 349
Mayor Alioto cites *Georgia* v. *Pennsylvania Railroad Co.*, 325 U.S. 439 (1945) for the proposition that, according to the Supreme Court, parens patriae is applicable to States suing under the antitrust laws 349
Mayor Alioto discusses the common law doctrine of parens patriae 350
Mayor Alioto contends that the Court did not say in the Georgia case that a parens patriae suit under the antitrust laws may seek an injunction but no damages; he takes issue with the Ninth Circuit reasoning in *Hawaii* v. *Standard Oil* that Congress intended a difference between the injunction and damages sections of the Clayton Act 350
Citing the settlement ($200,000) in the *Hawaii* case, Mayor Alioto contends that "there is today a crack through which a lot of violations can fall"; and that it is important that a legislative change be made 351
Courts, and particularly the eighth and ninth circuits, do not like private antitrust suits, and the courts have continually engrafted restrictions onto the antitrust laws that Congress never intended; Mayor Alioto cites some of the antitrust cases that have reached the Supreme Court after courts of appeal have ruled in favor of defendants 351
The class action permissible under rule 23 of the Federal Rules of Civil Procedure is in fact not being allowed in alleged price-fixing actions because courts are saying that with so many consumers affected, the class would be unmanageable 352
Adding *Eisen*, which required individual notice in class actions, to the constraints of class actions formerly announced, the need for parens patriae legislation is all the more necessary, because "the more widespread the violation or the more widespread the number of victims of a violation involved, the more difficult it is to enforce the antitrust laws" 353
There is a great temptation to commit crimes such as price rigging or bid rigging if those crimes will almost certainly pay off 353
Mayor Alioto cites a case involving the differential between the price paid to cattlemen and the price charged for retail beef, where price fixing was proved, but where the court refused on manageability grounds to certify the case as a class action with respect to distribution of the $11 million ($33 million, trebled) damage award 353

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The Supreme Court pronouncement that class actions are sufficient and that parens patriae is not necessary "flies in the face" of reality 354
There have been abuses of the class action statute by some lawyers; nevertheless, the class action can be a very effective device where the number is not exceedingly large 354
Mayor Alioto answers the due process arguments made by Prof. Milton Handler in testimony before the subcommittee on June 3; particularly, he cites the availability of statistical proof of damages in consumer actions 354
Mayor Alioto states that before the U.S. Attorney General be permitted to file an action if a general State attorney does not, city attorneys and corporation counsel be permitted to file parens patriae suits; the courts can work out the matter of the precedence of suits where they are filed by both the State attorney general and a city attorney 355
The idea of individual notice should be removed from both class actions and parens patriae suits 355
Nolo contendere pleas should be allowed as prima facie evidence in subsequent civil action since "people who are not guilty [do not] plead nolo contendere willy-nilly" and private parties should not be prevented from using the pleas to recoup losses due to the illegal activity that resulted in the nolo plea; moreover, courts have stated that for purposes of punishment, there is no difference between a guilty plea and a nolo plea 356
Congress never said that "a final judgment, except a plea of nolo contendere," shall be used in subsequent civil litigation; that is a court-added restriction that has come to be regarded as a statutory requirement 357
The interpretations courts were putting on section 5–A which relates to the right to use a prior judgment as prima facie evidence were also restrictive 357
Recently a judge refused a class action certification stating that he believed the class action in antitrust cases was just for lawyers, not for consumers. This denied the right of everyone except the name plaintiff to recover 357
When the electrical indictments were brought back in 1960, there was a 50-percent drop in prices 357
In the *Gypsum Wallboard* case $75 million in judgments were paid out on the coast in San Francisco and the price of wallboard, during an inflationary period, dropped almost 40 percent 357
When a private action was brought on herbicides on behalf of a group of growers in California, the price was reduced 50 percent upon the filing of the case 358
The notion that there cannot be a very substantial reduction in prices during an inflationary period by a vigorous enforcement of the antitrust laws is belied by any cases which have national implications 358
Currently it is very difficult to get to the Supreme Court with an antitrust case 358
Plaintiffs are also being hurt by judges granting new trials to defendants 358
If there is no reform to correct these difficulties to the plaintiffs, there will be little private action in the antitrust field and that is the most effective pillar of antitrust enforcement which is available 359
Mayor Alioto's office tries more cases for plaintiffs that any office in the history of the United States, and has approximately 75 cases on the books 359
Senator Hart compliments Mayor Alioto on his presentation and states that he has been convinced and that the likelihood of favorable action on this bill would be greatly increased if the whole Senate could hear the mayor 359
Mr. O'Leary states that the nolo contendere portion of the bill has run into substantial resistance and asked Mayor Alioto what effect there would be on private treble damage if litigation were enacted permitting private plaintiffs to have access to Grand Jury documents and testimony which the employees of the defendant gave before the Grand Jury after a plea of nolo contendere 359
Mayor Alioto responded that he thought the nolo contendere bill should be enacted and that this other provision would also be helpful. As a practical matter, the mayor stated, grand jury testimony can be obtained by a simple motion to produce the documents that they gave the grand jury or by asking whether they testified before grand juries and what their recollections were 360

Mayor Alioto states that letting a collusive price fixer plead nolo contendere looks as though there is a different law for different classes and that this brings the whole matter of law enforcement into disrepute ---- Page 360

Mr. Chumbris states that Assistant Attorney General Kauper stated that he is against the nolo contendere amendment on the basis that it effects the Department of Justice prosecution in fulfilling their responsibilities in antitrust cases ---- 361

Mayor Alioto comments on Mr. Chumbris' quotation saying that the Department of Justice lawyers do not cooperate and do not want to cooperate with private antitrust actions and cites the example of Judge Stanley Barnes who wrote the *Clore* decision mentioned earlier ---- 361

Mayor Alioto also states that he does not believe it is true that the Justice Department will try more cases since they will not bring an antitrust case unless they have very concrete evidence and letting defendants plea nolo centendere in such a case is simply letting those defendants off the easy way ---- 361

Mayor Alioto further comments that antitrust cases suffered under John Mitchell ---- 361

Mayor Alioto states that although there is nothing in the statutes stating that divestitute is different for the Government as against private parties the courts have so held ---- 362

Senator Hart reiterates Mayor Alioto's point that differing treatment under the law for the pillar of the community and the kid from the back alley has a bad effect on respect for the law ---- 363

Statement of Peter Max, Vice President of National Economic Research Associates, Inc ---- 364

[Mr. Max submitted a prepared statement for the record]

Mr. Max states that he has been involved as an economist in over 70 antitrust cases and his testimony will be focused on title IV (parens patriae) and title VI (nolo contendere) ---- 371

Title VI would make nolo pleas prima facie evidence of a violation in a civil case subsequent to a Federal criminal action and Mr. Max favors this amendment in general but expressed several doubts as to its efficacy ---- 371

There are four main reasons for his doubts: (1) until now Federal criminal antitrust prosecution has not been the major means of antitrust enforcement, (2) unless there is a major change in the budget-constrained level of Federal enforcement, this amendment will not do much to increase the effectiveness of enforcement, (3) the substantial number of significant private actions in recent years suggests that the private bar has not been unduly hampered by the lack of this provision and (4) the depth and breadth of discovery in major private suits often yields more evidence than is required for a Federal criminal case and most plaintiffs find great benefit in laying their evidence before the trier of fact ---- 372

In the last 10 years the Government has filed an average of 58 antitrust cases per year and on 15 of these on the average have related to price fixing ---- 372

The reason Mr. Max favors this legislation is because of the sharp rise in the number of criminal indictments in the last 2 years ---- 372

The number of cases filed by the Antitrust Division can be misleading since (1) cases of the magnitude of the currently pending civil actions against IBM and A.T. & T. can be far-reaching in terms of both potential direct impact on the industries involved and in terms of the deterrent effect on large firms in other industries, and (2) the level of activity is probably more a function of congressional determined budgets than a lack of desire for active enforcement ---- 372

The number of private antitrust suits brought by State governments and the private bar have increased from less than 500 annually 10 years ago to over 1,000 in the last few years, and it can be argued that the private suits have been effective both in detecting price fixing and, if penalties are a deterrent, more effective in creating a deterrent ---- 372

A large percentage of defendants in antitrust criminal suits plea nolo contendere ---- 373

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Enactment of title VI would probably lead to more pleas of not guilty by those who would have plead nolo contendere. This could result in a sharp increase in the number of trials, further taxing the Antitrust Division's resources, which may lead to a reduction in the number of indictments. On the other hand, since Federal criminal antitrust cases are usually cases with well developed evidence prior to the issuance of an indictment, trial may involve relatively little incremental effort ---- 373

Most antitrust cases are cases filed by private parties plaintiff and most of the larger of those cases have been settled prior to trial ---- 373

Private suits can result not in fines equalling some fraction of the ill-gotten gains, but in damages equalling a multiple of those gains and therefore, if monetary penalties are a means of preventing antitrust violations, the threat of successful damage actions by private plaintiffs must be the most effective deterrent ---- 374

Many of the private cases discussed above did not benefit from prior Government action ---- 374

Given the depth of discovery in private antitrust cases, the plaintiff's strategy probably will be to attempt to lay before the court all the proof the Government had and as much more as he can get so the prima facie value of a prior plea of nolo contendere may be rather small ---- 375

Title IV would give the attorney general of any State the right to sue as parens patriae for damages to persons in his State and/or for damages to the general economy of his State. Generally, Mr. Max favors this but does not feel certain sections would be workable ---- 375

Mr. Max calls for the deletion of section 4D which would permit the Attorney General of the United States to become parens patriae of persons residing in those States where State action is not taken, the limitation of section 4C(a)(1) to natural persons and political subdivisions, the substantial modification or deletion of section 4C(c) relating to proof of damages and for the deletion of section 4C(a)(2) permitting collection of damages to the general economy of a State ---- 375

Mr. Max's opposition to permitting the U.S. Attorney General to act as parens patriae for State citizens is based on two grounds: the evidence shows that States can, and do, very effectively and vigorously prosecute antitrust damage claims and that this section could have the unintended effect of discouraging the growth of antitrust capabilities at the State level ---- 375

There is no need to further complicate the legal framework of antitrust by including corporations in the parens patriae provision since it is natural persons and political subdivisions who are presently often unable to obtain relief. Business entities have not been seriously impeded ---- 375

Regarding section 4C(c)(1), there is no reason to abandon the present rules regarding proof of damages since (1) specific proof of injury should be required to the maximum feasible extent and (2) plaintiffs presently are not precluded from using samples and statistical methods ---- 375

In the parens patriae case a provision for proof of damages should be made, but it should not be one which permits a fluid class recovery but rather a provision which states that such an approach shall not be prohibited where proof convinces the trier of fact that only by permitting such a means of recovery will the ends of justice be met ---- 376

The terminology in section 4C(a)(2) is vague and amorphous ---- 376

Title VII would add a new section 21 on complex cases to the Clayton Act, and Mr. Max approves of this, but states that since economics is not a hard science, differences between economists' interpretations of the same set of facts are best resolved by the adversary process. (Attached to the prepared statement are six tables of data on antitrust cases.) ---- 376

[End prepared statement]

Mr. Max summarizes his prepared statement ---- 364

In response to a question by Mr. O'Leary, Mr. Max states that he has testified on behalf of both plaintiffs and defendants regarding proof of damages by the use of statistical or sampling methods ---- 369

In response to a further question by Mr. O'Leary, Mr. Max states that in recent years there has been a liberalization in what kinds of statistical and sampling methods courts permit, and that the use of computers has become more predominant. He also commented that in several instances the court has in effect compelled the parties to hammer out between them their most complex statistical problems or areas of methodologic l disagreement — Page 369

Mr. Max concludes that if there is a provision in the law such as the one proposed here which states that you can use certain methods without defining the standards, the standards will fall — 369

Mr. Max states in response to a question from Mr. O'Leary that to the maximum extent feasible plaintiffs should be required to prove their purchases but where that is not possible, the burden of proof should be put on the plaintiff and if the court is convinced that it is not possible, then the fluid class system should be followed — 370

In response to a question, Mr. Max states that when all the injured consumers cannot be located he is not bothered by the allocation of the remaining damages to programs such as drug abuse — 370

Mr. O'Leary and Mr. Max discuss table 6 which was attached to Mr. Max's prepared statement and which concerns the number of cases brought by the plaintiff's bar which do not follow in the wake of a Government suit — 371

Statement of Mark Silbergeld, attorney on behalf of Consumers Union, Consumer Federation of America, and National Consumer Congress — 387

[Mr. Silbergeld submitted a prepared statement for the record]

Consumers Union, the Consumer Federation of America and the National Consumer Congress are described — 395

The importance of antitrust laws is discussed — 396

Antitrust laws have not worked well enough in large part because they have not been enforced well enough, and S. 1284 is designed to correct this. The groups represented by Mr. Silbergeld support these amendments — 396

The proposed legislation would enable State attorneys general to bring citizens suits for damages under the antitrust laws and this power would have a very significant deterrent effect on practices which are clearly anticompetitive and would make possible consumer redress for antitrust injuries which are not now available — 396

This legislation would also improve the ability of potential private plaintiffs to maintain treble damage actions and to further this purpose, it is recommended that agency investigative files be made available after the law enforcement purpose has been achieved or terminated — 396

The Bayh amendment is also supported by these groups — 396

It is also recommended that the attorney's fees award provisions of 15 U.S.C. § 15 be extended to cover suits for antitrust injunctions — 396

The amendments to the Antitrust Civil Process Act contained in title II are also supported, but certain changes requested by Assistant Attorney General Kauper are disagreed with, and S. 1284 does not go far enough with regard to public access to information obtained by Civil Investigation Demand (CID) — 396

It is recommend that once the Antitrust Division has disposed of an investigation or completed litigation or a consent agreement, files of the Civil Investigation Demand should be available to any member of the public on request under the Freedeom of Information Act — 397

It is also recommended that even if such a disclosure provision is not added to S. 1284, the Antitrust Division should be required to maintain and disclose upon request, a list of documents and testimony obtained by CID. This would minimize the duplicative efforts required for discovery by potential private plaintiffs — 397

In addition to the provisions of § 301, title III should contain a provision designed to reduce the multiplicity of suits involving the same subject matter and issues. This provision should express a congressional policy disfavoring such multiplicity, the U.S. District Court for the District of Columbia should be the favored forum, the second choice of forum should be the district where the company has its principal place of business, and the courts should be authorized and required to consolidate such multiple suits according to these preferences — 397

Support is expressed for title IV and a copy of the comments submitted by the Consumers Union on similar legislation which was considered by the House Judiciary Committee's Subcommittee on Monopoly is submitted for the record ..... Page 398

Title V is discussed and the confidentiality which the Antitrust Division recommended for the actual notification of intention to merge is strongly opposed. Instead of secrecy, what is required is the provision for disclosure of merger notification upon request, as well as a requirement that the two antitrust agencies keep and make public a record of their actions in opposing or not opposing mergers of which notice is given under title V 398

Title VI is discussed and supported despite the objections of the Antitrust Division that it may result in more litigated cases since there is a predictable deterrent effect to be obtained from the availability to private plaintiffs of the Government's evidence in contested criminal prosecutions 398

The real issue in title VI is not the mechanical one of what evidentiary value should be given to a nolo contendere plea but rather the duplication of discovery which is necessitated when a plea of nolo prevents private plaintiffs from obtaining usable evidence from the Government's antitrust investigation and prosecution 398

The policy justification that the form of plea entered by an antitrust criminal defendant should determine whether potential private plaintiffs will be required to engage in duplicative discovery which may be prohibitively expensive is disagreed with 399

There should be public evidentiary files, but if that recommendation is not adopted, the prima facie evidentiary value of the nolo plea as provided in § 601 should be established 399

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There should be public evidentiary files but if that recommendation is not adopted, the prima facie evidentiary value of the nolo plea as provided in § 601 should be established 399

The proposed title VIII is discussed and doubt expressed as to whether this provision is or can be drafted with enough clarity so that a prudent business firm would not refrain from legitimate, hard competition which is in the consumers' interest in order to avoid antitrust difficulties 399

A penalty related in some way to the gains of an antitrust violation is seen as a better means of redress to the economy and as a better deterence than a fine of a flat amount 400

[End prepared statement]

Statement of Mark Silbergeld 387

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In response to a question from Mr. Nash, Mr. Silbergeld states that recently consumer groups have put a much greater emphasis on the role of competition and antitrust policy as consumer protection measures although there has been consumer interest in the antitrust field even going back to the 1930's	391
Mr. Silbergeld comments that it has taken a recession coupled with severe inflation to call people's attention to antitrust	391
Mr. Silbergeld and Mr. Nash discuss regulatory agencies	391
Mr. Silbergeld divides regulatory agencies into three categories: (1) those dealing with areas such as drug safety which are traditional exercises of the constitutional authority of the State to protect the health and welfare of its citizens, (2) those such as the CAB and the ICC where the purpose is purely economic, and (3) agencies such as the FCT where the purpose is not to plan economically but to prohibit certain kinds of practices	392
Mr. Silbergeld comments on the performance of those agencies, and States that this performance is greatly effected by the kind of criteria the President uses when he makes an appointment to these agencies and by the criteria used by the Senate when passing on these nominations	392
Mr. Nash asks Mr. Silbergeld for comments on the argument that the parens patriae provisions of the bill are an unjustified boon to the antitrust private plaintiff's bar since most of the recovery from treble damage action has gone to the attorneys, not the consumers on whose behalf the action was brought	393
Mr. Silbergeld comments that there is even more of a boon to the antitrust defendant's bar since there are usually half a dozen defendant's lawyers for every one plaintiff's lawyer in a treble damage action. He further states that the fact that a lawyer makes a substantial contingent fee out of a case is not an appropriate question here but rather should be discussed when determining what kinds of restrictions the bar or courts should put on attorneys fees	393
In response to a question by Mr. Chumbris, Mr. Silbergeld clarifies his statements on the civil investigative demand stating that the documents should be put on the public record or made available subject to two qualifications: the exemptions of the Freedom of Information Act and the kinds of restrictions which are now reflected in the Federal Trade Commission's public disclosure regulations	394
Mr. Chumbris discusses the civil investigative demand and states that the Congress has been very restrictive on this issue	394
Mr. Silbergeld attacks the argument that investigators will be unable to get the information they need if everybody can obtain this information saying that this claim is very hard to evaluate and that even if it were true it does not take into consideration the value of the eventual disclosure to a private plaintiff as a deterrent to the very action which they find necessary to investigate	395
Statement of Dr. Willard F. Mueller, Vilas Research Professor, University of Wisconsin	400
There is increasing awareness of the need for antitrust reform on the part of economists and the public at large	400
There appears to be quite widespread support for S. 1284 among economists	400
In May copies of S. 1284 were sent to a hundred academic economists known to be particularly expert and interested in the field of competition policy and they were asked whether they supported the general principles of this legislation. Some of the signators did not agree with every feature of S. 1284 but 70 of the fewer than 100 who were sent this letter responded affirmatively	401
Dr. Mueller states that he is in general agreement with all titles of the proposed legislation and will restrict his comments to title V which concerns the premerger notification	401
Mr. Meuller has been concerned for almost 20 years with the enforcement of section 7 of the Clayton Act and has spent 8 years trying to enforce it at the FTC	401

In very few cases where the Government ultimately prevailed, has there been completely successful divestiture of the acquired unit. Most cases have been concluded with no divestiture, token divestiture, or divestiture of the acquired firm to another corporation rather than reestablishment as an independent entity. This record represents a serious indictment of the effectiveness of enforcing section 7 — Page 401
The defects of the present merger enforcement activities might be summarized as follows: (1) frequently defendants do not now have an incentive to cooperate fully with the enforcement agencies and the courts in expediting litigation, (2) once a merger is consummated, prolonged litigation results in the loss of competition during the period of litigation, (3) protracted litigation and a history of inadequate relief tends to breed contempt for the effectiveness of the enforcement agencies, (4) once a merger is fully consummated, it is often impossible to restore the state of competition existing prior to the merger and (5) when there is protracted litigations, this is taken into consideration by the FTC and the courts — 401
As long as firms are permitted to merge without first obtaining premerger clearance or before the case is litigated, there will be needlessly long litigation, adverse effects on the decision making processes of the courts and the FTC, and inadequate or meaningless relief — 402
It is suggested that title V be changed to include acquisition involving consideration paid of $10 million or more since this is a more meaningful measure than sales — 402
Unless the agencies are given sufficient funding to enforce section 7 they will not be able to enforce title V effectively — 402
Section 23 authorizes the FTC after consultation with the Justice Department to promulgate regulations for implementing the notification provisions and this should not be changed as the Justice Department desires since the FTC has broader investigatory and administrative authority — 403
The fact that the merger pace has slackened since 1970 does not mean that this title is unnecessary. The recent slowdown is most likely only temporary and merger activity already shows signs of reaccelerating. This period of relative calm in merger activity should be used to perfect the antitrust laws in preparation for acceleration in mergers — 403
Dr. Mueller states that he, too, has observed the hostility on the part of the Department of Justice to both States and private individuals who bring private enforcement actions and that the Department of Justice simply settles too many conspiracy cases — 403
Mr. Mueller also takes issue with the argument that satistical measures of total damages threaten to deny defendants due process, stating that aggregate statistical measures of damages may contain errors but they do not err in measuring total liabilities to the defendants; rather, they pose problems in distributing the benefits among the plaintiffs — 404
Statement of David Dale Martin, Professor of Business Economics and Public Policy, School of Business, Indiana University — 404

[Mr. Martin submitted a prepared statement for the record]
Antitrust needs improvement and this bill is a useful first step in the right direction — 411
The history and the effect of the Sherman Act are discussed — 411
Title I is supported — 412
Although there are no generally accepted propositions concerning the relationship between the competitiveness of particular markets and macro-economic goals, Congress can use its common sense and good judgment in this matter. There is very little risk associated with erring on the side of increasing competition — 412
A more competitive set of conditions in particular markets would make easier the tasks of economic policy in accomplishing full employment without inflation since the body of economic theory that attempts to explain the consequences of alternative monetary and fiscal policies for macro-economic goals is based on the assumption that certain markets are competitive — 412

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Several conclusions lead to agreement with title I: monopoly power has become more pervasive since combinations in restraint of trade were legalized in 1895 by the Supreme Court's decision in the E. C. Knight case, and monopoly power and restraint of trade affect investment in new plant and equipment and the rate of technological innovation ---- 413
Both titles V and II would help nip mergers in the bud. However, there are two problems: (1) it is essential that if premerger notification is required, the Federal Trade Commission and the Antitrust Division be given adequate personnel and budget to perform their new duties, and (2) section 23(g) contained in section 501 of the bill requires the acquiring corporation to dispose of unlawfully acquired stock or assets at a price not to exceed the purchase price should be changed. This may provide a windfall to the buyer and the power to grant a windful to others is itself a windfall ---- 414
The bill should require that any acquisition of the size that would bring it under the notification provision should be scrutinized by the enforcement agencies to ascertain whether it may substantially lessen competition ---- 415
Businessmen's behavior is likely to be affected favorably by measures such as those in titles II, III, and IV which would increase the chances that antitrust violations actually will prove to be unprofitable ---- 415
Section 702 is supported but the intent of Congress to change the court procedures in complex antitrust cases should be clearly expressed ---- 415
Section 702 should be changed or a new provision added to the bill to provide for more expeditious and equitable procedures in private cases as well as cases in which the U.S. is the plaintiff ---- 415
Section 702 is discussed and it is concluded that the use of special masters and economic experts may prolong a case ---- 416
Economists can be used effectively but should not be used as authorities on matters which should be determined by the judge such as assessing the credibility of witnesses ---- 416
S. 1284 should be amended to incorporate some of the language of S. 1167. S. 1167 contains proposals to amend the Rules of Civil Procedure by changing part VI of title 28 of the Code to include a section on expert witnesses ---- 416
The bill should be changed to authorize the necessary expenditures and a special fund should be provided for the judiciary so that the salaries and expenses associated with special masters and economic experts can be met ---- 417
Private antitrust cases should also be funded publicly if the bill is amended to include provisions for declaring private antitrust suits to be complex cases ---- 417
Senator Bayh's proposed amendments to S. 1284 are discussed and seen as worthwhile additions to the antitrust law ---- 417
[End of prepared statement]

Statement of David Dale Martin ---- 404
Mr. Nash states that Senator Hart did review Dr. Mueller's statement and was going to make the observation that it summarized quite succintly the precise reasons for the introduction and inclusion of title V. in S. 1284 ---- 407
In response to a question, Mr. Mueller states that mergers have played a central role in creating the kind of centralized, concentrated industrial structure we have today ---- 407
Mr. Martin comments that the failure of the law to prohibit mergers at all between 1895 and 1904 is the real root of the problem ---- 407
In response to a question concerning the dollar amount contained in the asset and sale provisions of Title V, Mr. Mueller states that he supports the $10 million figure ---- 408
Mr. Mueller states that in recent years there have only been between 50 and 60 acquisitions where the acquired company had $10 million ---- 408
In response to a question, Mr. Mueller responded that the FTC would need a staff of at least 60 attorneys and 40 economists to tackle their expanded workload ---- 409
Mr. Martin comments that if Congress passes the provision it should also increase the budget and the personnel authorized for the FTC ---- 409

In response to a question, Mr. Martin stated that he is not suggesting that any acquisition of stock, whether it be a dollar or a million dollars, be subjected to the reporting requirements of title V. He further states that if the reporting of acquisitions greater than a certain size are required, there should be no exception to the requirement that acquisitions of that size be reported ahead of time simply because the acquirer asserts it to be for investment purposes only ..... Page 409
Mr. Chumbris inserts for the record a reprint of an article written by Kenneth Elzinga which Mr. Elzinga states ". . . has some bearing on parts of S. 1284 which prevents me from supporting the bill" 410

THURSDAY, JUNE 12, 1975

Senator Philip A. Hart opened the hearing 419
Statement of David K. Watkiss, attorney from Salt Lake City, Utah 420
Will talk about his experience with the *El Paso* case, one of the more protracted, complex, and possibly well-publicized antitrust divestiture cases 420
This legislation is needed to avoid the damage to the public interest that comes about through many years of protracted litigation during which time a monopolistic condition or an anticompetitive condition is allowed to be perpetuated because there is no efficient means to unravel it easily and expeditiously 420
Great imbalance exists in divestiture cases with respect to legal representation. *El Paso,* with its enormous resources, instead of being represented by one lawyer never had less than three in court 421
The company that has violated the law comes before most Federal judges in a preferred position. In divestitute cases, there is no way under the law for stopping the acquisition and there is no adverse effect the courts can impose as a punishment. The acquiring company can look to substantial profits that it can retain 421
The courts are involved in a difficult area, and they do not have the resources. A company with resources can muster great political influence 422
Convinced that we must take the economic advantages and the profits out of the illegal acquisitions to discourage them. At the same time legitimate acquisitions should not be inhibited unduly. This is a difficult task 423
Suggests that in the Declaration of Policy, it must be the objective of effective antitrust enforcement that the profits, the advantages that can be obtained should be, if at all possible, removed in a divestitute, and that the profits cannot be retained and a purchase price in excess of what was paid for it should not be permitted unless the court can make a finding that in these particular circumstances that cannot be done 423
Consideration should also be given to the fact that the party who is a defendant in the case is in control of the destinies of the company, and if they are limited in what can happen at the end, they may reduce the company by sheer neglect 423
Prepared statement of David K. Watkiss, follows closely testimony given. On pages 16–18, certain suggestions are offered. 1. Some fixed time limit should be placed upon the time in which an agency can hold up a merger in order to receive and evaulate information. 2. Transactions which do not pose any potential anticompetitive problems should be specifically identified to the fullest extent possible and excluded from the notification requirement. 3. Coordination must be achieved among all agencies, even with those agencies that do not pass upon antitrust questions. 4. All information provided and requested should be made confidential, unless litigation is initiated. 5. Consideration should be given in making some distinction between the requirements for stock and asset acquisitions. 6. Some discretion should be given to the district court to lift a stay order. 7. The requirement that the divestiture order include profits held in escrow and fix a sales price for all divested assets not exceeding the purchase price of such assets is too rigid and deprives the court of the flexibility needed in order to fashion appropriate divestiture relief in light of existing conditions and the particular problems of the case 423
Statement of John H. Dougherty, retired attorney, Antitrust Division, Department of Justice 430

The *El Paso* case lasted for 17 years, from 1957 to the divestiture on February 7, 1974. Mr. Dougherty was the Government employee employed in the trial of that case for the last of its 7 years. If the premerger notification had been in effect, it would have spared us the *El Paso* case — Page 430

Likes the provisions for relief pendente lite in a suit challenging a merger or acquisition and for further relief upon an adjudication of unlawfulness — 431

Suggests in addition to this that there be a waiver if the trial court expressly finds that the provision is inapplicable or enforcement would be contrary to the findings and policy declared in title I. The tax advantages should be taken out of merger; the financial rewards should be taken out of merger; and tax advantages of operating losses, accumulative or prospective, should be removed as an incentive to merger and acquisitions, but only where the merger or acquisition has been found to be in violation of the antitrust laws — 431

Suggests impounding the profits earned out of illegal acquisitions and mergers as the bill provides. It should be made impossible for the lawbreaker to finance his violation out of the profits he reaps from his violation. So long as a violation can be self-supporting, illegal mergers will continue to be viewed not as the lawful and unlawful acts they are, but as business propositions — 432

In cases of clear inequity for the impounded profits to go to the divestee, the trial court should be authorized to order the profits covered into the U.S. Treasury as miscellaneous receipts. The cost of acquisition as determined by the trial court should be the ceiling price on a divestiture by sale — 432

Suggests a prohibition against the acquirer in an illegal acquisition having the advantage of claiming a loss for tax purposes if the divestiture price comes out to be less than the acquisition price — 432

These suggestions should provide additional deterrents to illegal acquisitions and mergers — 433

In response to a question, Mr. Dougherty stated that as a result of the El Paso divestiture, the company that was created is strong, viable, and providing the type of responsive gas service that they knew it could provide — 433

In response to a question, Mr. Watkiss stated that El Paso spent at least $15 million during the 17-year effort. The applicants in the case spent at least a quarter of a million dollars in each divestiture — 434

In response to the same question, Mr. Dougherty stated that a partial idea of the expense to El Paso could be gotten from the annual reports that El Paso filed with the Federal Power Commission. It spent $893,000 in the effort to get S. 1284 passed in the year 1971 alone — 435

Mr. Dougherty stated that the proposals he was advancing were not limited to the natural gas industry but were proposals of general application — 436

Mr. Watkiss stated that the problems involved in a classic example case of divestiture were pointed out, the same problems that would be encountered in most divestiture cases where there are substantial companies involved in a complicated market condition — 436

Prepared statement of John H. Dougherty, follows closely testimony given — 436

Statement of Arnold M. Lerman, The Business Roundtable — 440

Will speak principally about title II, the grant of cumpulsory power to inquire. Deeply concerned about that power. It is coercive and uncontrolled. It extends everywhere and touches every person. It incorporates all of the abuses that attach to grand jury powers, and it afford neither the protection of the grand jury or the justification for the use of the grand jury process. The title incorporates everything that was rejected after 7 years of deliberation leading to the passage of the Antitrust Civil Process Act, rejected because of deep concerns about intrusion upon individual rights, concerns about harassment and abuse — 440

There is little that cannot be asked. If responses are not forthcoming the Department can invoke the contempt sanctions and put people in jail. Information can be demanded from anyone, it may even insist that a person obtain information from others. There is no impartial person present to protect against abuse or harassment — 441

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A person is under compulsion to reply and he is largely at the mercy of the scruples or the sensitivity of his interrogators	441
These comments do not reflect on particular persons who now serve in the Department, but express a concern with the possibility of abuse	441
The Department already has criminal grand jury process for antitrust violations, and it is not understood how it is possible to want to extend those grand jury techniques to civil regulatory laws	442
Two reasons in support of title II have been given by the Assistant Attorney General—investigative efficiency for antitrust cases, and assistance in amassing information for the Department's role as protector of competition in administrative agency proceedings. While title II would contribute to efficiency, how much do we really need it and is it, in any event, worth the price? It already has an incredible array of investigatory authority, including many other ways to reach information through compulsory process	442
There is no convincing demonstration in the justifications for the depth of any enforcement need. We can have more investigative efficiency were we to abolish constraints against wiretapping or to revoke the fourth amendment prohibitions against unreasonable search and seizure, but we choose not to do so, and the question is no different here	443
The prepared statement of Arnold M. Lerman follows closely with the testimony given on title II. In the prepared statement, he also discusses title IV and title V. The parens patriae concept is really a system of social penalties. He is not persuaded that class actions under rule 23 have ceased to be a viable vehicle offering compensation to consumers who are injured by antitrust violations. Even if the class action is not available as a remedy in all cases, it is far superior to title IV if it is tested by standards of its delivery of actual damages directly to persons injured. The goals of title IV are more of a penalty than an effort to redress individual injury. When title IV is tested by rational standards which one would apply to a penalty system, it is sorely wanting. Title V, dealing with premerger notification, creates a long mandatory waiting period which may be further enlarged. It grants to the Government agency, rather than to the court, control over the issuance and terms over the orders. It removes court discretion and compels the issuance of a divestiture order in terms which set a mandatory maximum price for the divestiture itself. Thus, it substitutes Government fiat for an objective judicial judgment. So long as the Government is willing to file a complaint, it can prohibit closing the acquisition regardless of the likelihood of the Government's success on the merits. The net effect is to enable the Government to thwart acquisitions whether or not they violate the antitrust laws and even in circumstances where there is no intention of bringing suit	443
In response to a question concerning where in the bill it says that the Department after it had made such an inquiry can use it in a SEC action, Mr. Lerman pointed to page 11, line 23 and page 12, line 17	444
In response to a question, Mr. Lerman clarified his statement with respect to the same concerns being voiced with the legislation 12 years ago. They were not voiced with respect to the civil investigative demand which is contained in the act today, but as to other portions that were then being proposed or considered	444
Responding to questions, Mr. Lerman stated that one real concern is that the authority is hitched to the prosecutorial arm of the Government. Even more than that, even where exercised by regulatory agencies there is an accommodation of the need for information for regulatory purposes with whatever private rights we seek to protect. There is absolutely no protection in the bill, and only the grossest kinds of abuse would be protected	445
Upon being asked if it would be less offensive if grand juries were authorized to investigate antitrust violations, Mr. Lerman responded that he hoped that such is not authorized because the entire grand jury process is under scrutiny and rightfully so, since it is not serving even to the extent that we would hope	445
Upon being asked for a membership list of the Roundtable, Mr. Lerman stated that he would furnish it. (To be furnished for the record)	446

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In response to a question as to whether he would favor repeal of the present Antitrust Civil Act or if he believes that with 13 years of experience that the Congress was wise in enacting that statute, Mr. Lerman stated that his personal view was that it had served the division and the public well ---- 446

In response to a question, Mr. Lerman commented that he favors an extension of authority to counter the decision in *U.S.* v. *Union Auto*, but that this could be accomplished simply by saying that in cases of acquisitions or mergers the Civil Investigative Demand statute would apply. A good bit of that authority already exists with the Federal Trade Commission ---- 447

Responding to a question, Mr. Lerman stated that the language (". . . or in any activities which may lead to any antitrust violations") is very troublesome all by itself. An investigator armed with the authority to probe into that kind of conduct has available to him an excuse for probing into all kinds of areas without justification ---- 447

In response to a question, Mr. Lerman stated that while a person could go to court for protection, all the Government would have to state is that very generally some kind of investigation is going on for which the information is sought ---- 448

Responding to a related question, Mr. Lerman remarked that his point is that the objections are going to have very little substance because the scope of what may be inquired into is just so very broad ---- 448

In response to a question, Mr. Lerman emphasized the problems with the interrogatory power. It pressures individual people who are placed in those circumstances without real basic protection ---- 448

Responding to a question, Mr. Lerman stated that he was vehemently opposed to taking private depositions by the Antitrust Division. Taking of public depositions raises different types of concerns ---- 449

In response to a question, Mr. Lerman reiterated his position that even if the ability to question under oath was extremely important under many circumstances, it should be tolerated only with protection and the interposition of some kinds of independent judgment and discretion on the ability of the Department of Justice to act ---- 450

Responding to a question, Mr. Lerman also states that he finds third party document production objectionable ---- 450

Statement of Harold E. Kohn, Esq., Philadelphia, Pa ---- 465

The 20-day filing period will not be lived up to ---- 466

The Department of Justice has to ride herd on the administrative agencies. There is no greater support for antitrust violations and monopoly in the United States than certain of the Federal agencies ---- 466

To prove an antitrust violation, you have to make it an issue and get discovery. The courts are going to be much more careful not to permit the Justice Department to abuse its powers than they are in private antitrust cases ---- 466

With many of the State governments and attorneys general taking a much more active interest in antitrust enforcement, they should be permitted to bring suit on behalf of people in the community, or on behalf of the general economy of the community ---- 467

Monetary damages for damaging the economy of the State can be ascertained ---- 467

The State can protect the interests of the people where nobody will bring an action because he does not have enough of an interest, or because the amount of damages are small, or because he is afraid ---- 468

The antitrust laws are one of the pivotal statutory schemes in our economy, and they have to have private enforcement. What you want to get is the people who have suffered the damage reimbursed. It would also have a deterrent effect because many of the coldblooded industrial corporations would be more interested in saving money than in saving an officer from going to jail ---- 468

A parens patriae suit would have the salutary effect of imposing a real obstacle commensurate with the damage done ---- 468

We would almost be better off if there was no nolo contendere, or if there was not section 5 of the act, because under the common law if somebody has lost a law suit or stipulated or had his judgment entered against him, and in nolo contendere case, they enter a judgment of guilty, he is collaterally estopped thereafter in any litigation from denying those facts and legal obligations, which are incident to the finding of guilt ---- 469

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Puts antitrust defendants on the same footing with all other defendants	469
In response to a question, Mr. Kohn stated that a nolo plea is not beneficial from a strict rule of law or the amount of the case point-of-view, but it has tremendous psychological effect	470
Statement of Professor Jonathan Rose, Arizona State University	474
The general need for parens patriae authority has been well established. Rule 23 has really failed as an effective remedy, and the common law rule of parens patriae has been refused extension	474
The bill ought to be limited to recovery on behalf of natural persons	475
Price-fixing will continue until it is unprofitable to engage in that type of activity	475
The greater number of persons who are injured by an antitrust violation, the less chance the transgressors, normally price-fixers, have of being effectively sued by those injured, and the greater chance they have of retaining the illegal profits	475
Giving State attorney generals this role is appropriate as "cooperative federalism."	476
The claim that the notice provisions in the bill are unconstitutional are supported by no analysis, no citation of cases except very brief, and they really read the cases improperly and they fail to distinguish those cases where the Supreme Court has held that notice by publication is unconstitutional. The notice provision is constitutional under a practical test—the nature and the size of the claims, the difficulty and the cost of giving notice, the adequacy of representation by the State attorneys general, and the damage provisions that are in section 4(c) and the strong governmental interests in affording a way of reimbursing consumers who are injured	476
If you desire to increase the deterrent effect of the antitrust laws, and give State attorneys general the right to sue, it will not be meaningful unless you have recovery of aggregate damages	476
That fluid class recovery may raise problems under the due process clause was not an issue decided in the Eisen case	477
The arguments about unconstitutionality and the arguments about the administrative problems fail to really understand what the effect of this bill is on the substantive antitrust law. It does not say that State attorneys general can sue to enforce the claims of private individuals. It says that the State is damaged under the antitrust laws when consumers who live there pay more because of price-fixing. It is the State who is injured	477
Congress has the power under the commerce clause to do this. Some of the administrative problems are eliminated if you limit classes to natural persons, individual consumers. Further, they only exist where the consumer was not a direct purchaser	478
The business about the passing-on defense obfuscates the issue and oversimplifies it. It is important that it be made clear that the right of the State attorney general to recover does not depend on whether the individuals who can claim against the fund could sue under existing section 4	479
The courts can work out whatever problems may exist regarding problems of measurement and duplicative recovery	479
Prepared statement of Professor Jonathan Rose, Arizona State University. It follows closely to the testimony given and elaborates thereon. It concludes that title IV is an appropriate response and effective solution to the problem of affording relief in cases where numerous consumers have been injured by antitrust violations. It meets the problem raised by the courts and certain segments of the bar to providing remedies within the existing confines of rule 23 and section 4 of the Clayton Act. The dimensions of the cases will be reduced, and actions involving more than one State only when they are consolidated under the Multidistrict Litigation Act. The notice provision is appropriate within the context of the problem presented, and is not without safeguards. It eliminates the problems raised regarding the activities and fees of attorneys representing the consumer classes	484

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The experienced know that it is best to effectuate a merger rapidly because the Government may not discover about the merger until after consummation; the Government may discover it, but too late to prepare an effective case; or the Government may discover in time and may be able to prepare its case, but will be unable to get an effective preliminary injunction. In 90 percent of the cases, the merger relief must be rated as unsuccessful or deficient if the merger was consummated prior to Government action	500
The bill is needed for fairness and efficiency	501
While there is some danger in the bill that desirable market transactions will be clogged, it can be amended to cure that by tightening the long delay period, by cutting back slowly on the total Government discretion to ban mergers by bringing suit, and by providing for mandatory divestiture and not escrow of profits and the disgorging of any gain from the merger	501
The mandatory divestiture should be by spinoff or by public offering of the stock	501
The existing FTC premerger notification program is not adequate because the FTC itself says that it has not been able to get the information it needs under that program, the merging parties can compress the 60-day notice period at will, it provides for no stay of the merger, and it applies only to the largest mergers	501
The Government's existing right to obtain preliminary relief is not sufficient because it is not readily available. A failure of relief results most of the time unless a preliminary injunction is obtained, and to get a preliminary injunction the Government has been put to the same standard of proof which it faces at the ultimate trial	502
Prepared statement of Joseph F. Brodley, Professor of Law, Indiana University (Bloomington). It is an elaboration of his oral testimony, and after citing reasons for the need of such a bill, he evaluates the specific provisions of the bill	505
In response to some comments about possible revisions in the parens patriae provision, Professor Rose stated that the words "on behalf of" give some trouble. He would not use the word "injury" regarding consumers because it would raise the issue of standing. He would talk about "damage" to consumers. Using the words "parens patriae" itself raises some risks because it has a common law connotation	480
In response to a question, Professor Rose indicates that this provision is a new substantive antitrust claim, and it would not hurt to make it clearer so that a court does not have the opportunity to undo what Congress has intended	481
Responding to a question, Professor Rose cites violations of the trademark laws as a precedent for the legislation, where the violator is called for an accounting of the illegal profits without regard to proof of individual claims	482
Responding to a series of questions and comments, Professor Rose stated that the bill does not distinguish as to who may be sued, or whether any antitrust violations are not covered by the notion of parens patriae. If a State attorney general goes into court in other than a simple price fixing case, he has to prove that the antitrust laws were violated, that the State was injured and the amount of the injury. The courts can adequately handle those burdens of proof	483
In response to a statement concerning the wiping out of small businesses, Professor Rose commented that the genius of the courts will strike a balance between deterents and undue liability	484
Responding to a comment, Professor Rose indicated that this bill is important as congressional action to the end of making price fixing unprofitable	484
Statement of Joseph F. Brodley, Professor of Law, Indiana University (Bloomington)	500
Announces that he will discuss principally the issue of premerger notification	500

	Page
In response to a question, Professor Brodley indicated that an attempt to enumerate exemptions into the legislation has pitfalls and that he thinks the bill is just right as it is now written	503
Responding to a question as to why he suggests a substitution of the Bank Merger Act standard, Professor Brodley stated that it is more symmetrical and clear to follow the wording of an existing statute which is in the merger field. In response to a further question, he indicated that the defendant has the burden of proof under that Act	504

52-439 O—75—pt. 1——4

THE ANTITRUST IMPROVEMENTS ACT OF 1975

WEDNESDAY, MAY 7, 1975

U.S. Senate,
Subcommittee on Antitrust and Monopoly
of the Committee on the Judiciary,
Washington, D.C.

The subcommittee met at 9:37 a.m. in room 2228, Dirksen Senate Office Building, the Hon. Philip A. Hart (chairman of the subcommittee) presiding.

Present: Senators Hart and Hruska.

Staff present: Howard E. O'Leary, chief counsel; Bernard Nash, assistant counsel; Charles E. Bangert, general counsel; Joe L. Pecore (Senator Abourezk); Patricia Y. Bario, editorial director; Catherine M. McCarthy, chief clerk; Peter N. Chumbris, minority chief counsel; and Charles E. Kern (Senator Fong).

OPENING STATEMENT OF PHILIP A. HART, A U.S. SENATOR FROM THE STATE OF MICHIGAN, CHAIRMAN, SUBCOMMITTEE ON ANTITRUST AND MONOPOLY

Senator Hart. These hearings are on bills introduced by Senator Scott of Pennsylvania and myself (S. 1284) and on a bill introduced by Senator Fong on which Senator Scott and I are cosponsors.

We are going to have hearings in addition to today and tomorrow on the 3d, 4th, and 5th of June.

Yesterday, Senator Bayh told me he has introduced an amendment to S. 1284 which would allow the United States to recover a civil penalty up to 20 percent of revenue received by corporations from the sale of products related to the antitrust violation and to extend the Sherman Act's remedies and penalties to any criminal or fraudulent action taken with an intent to exclude others from engaging in business.

This type of predatory conduct would be actionable regardless of whether or not the perpetrator is a monopolist or is coming dangerously close to becoming one.

The subcommittee will see that copies of the amendment are provided each witness and would welcome the comments in writing from each.

I'll ask that copies of the bills under consideration be printed in full at this point in the record.

[The documents follow:]

94TH CONGRESS
1ST SESSION

S. 1284

IN THE SENATE OF THE UNITED STATES

MARCH 21 (legislative day, MARCH 12), 1975

Mr. PHILIP A. HART (for himself and Mr. HUGH SCOTT) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To improve and facilitate the expeditious and effective enforcement of the antitrust laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SEC. 101. This Act may be cited as the "Antitrust Improvements Act of 1975".

TITLE I—DECLARATION OF POLICY

SEC. 102. (a) FINDINGS.—The Congress finds and declares that—

(1) this Nation is founded upon and committed to a private enterprise system and a free market economy, in the belief that competition spurs innovation, promotes

productivity, prevents the undue concentration of economic, social, and political power, and preserves a democratic society;

(2) the decline of competition in industries in which oligopoly or monopoly power exists, and the decline of competition caused by State and Federal regulatory policies, have contributed significantly to unemployment, inflation, inefficiency, underutilization of economic capacity, a reduction in exports, and an adverse effect on the balance of payments;

(3) diminished competition and increased concentration in the marketplace have been important factors in the ineffectiveness of monetary and fiscal policies in reducing the high rates of inflation and unemployment;

(4) the near record rates of inflation and unemployment have caused extreme hardship and dislocation to the American consumer, worker, farmer, and businessman;

(5) investigations by the Federal Trade Commission, the Department of Justice, the National Commission on Food Marketing, and other independent studies have identified conditions of excessive concentration and anticompetitive behavior in various industries; and

(6) vigorous and effective enforcement of the antitrust laws, and reduction of monopoly and oligopoly

power in the economy, can contribute significantly to reducing prices, unemployment, and inflation.

(b) POLICY.—It is the purpose of the Congress in this Act to support and invigorate effective and expeditious enforcement of the antitrust laws by improving and modernizing antitrust investigation and enforcement mechanisms, to facilitate the restoration and maintenance of competition in the marketplace, and to prevent and eliminate monopoly and oligopoly power in the economy.

TITLE II—ANTITRUST CIVIL PROCESS ACT AMENDMENTS

SEC. 201. The Antitrust Civil Process Act (76 Stat. 548; 15 U.S.C. 1311) is amended as follows:

(a) Clause (c) of section 2 is amended to read as follows:

"(c) The term 'antitrust investigation' means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is engaged, has been engaged, or is about to engage in any antitrust violation or in any activities which may lead to any antitrust violation;".

(b) Clause (f) of section 2 is amended by striking out the words "not a natural person", by inserting immediately after the word "means" the words "any natural person or", and by inserting immediately after the word "entity" the

words ", including any body acting or purporting to act under color or authority of State law".

(c) Subsection (a) of section 3 is amended to read as follows:

"(a) Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of, or may have reasonable means of access to, any documentary material, or may have or may reasonably be able to secure any information, relevant to the subject matter of a civil antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for examination or to answer in writing written interrogatories concerning such information, or to give oral testimony concerning it, or to furnish any combination thereof.".

(d) Subsection (b) of section 3 is amended to read as follows:

"(b) Each such demand shall—

"(1) state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto; and

"(2) (A) if it is a demand for production of documentary material—

"(i) describe the class or classes of documentary material to be produced thereunder, with such definiteness and certainty as to permit such material to be fairly identified; and

"(ii) prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

"(iii) identify the antitrust investigator who will be the custodian to whom such material shall be made available; or

"(B) if it is a demand for answers to written interrogatories—

"(i) identify the antitrust investigator to whom such answers shall be made; and

"(ii) propound the written interrogatories to be answered; and

"(iii) prescribe a date or dates at which time answers to the written interrogatories shall be made; or

"(C) if it is a demand for the giving of oral testimony—

"(i) prescribe a date, time, and place at which oral testimony shall be commenced; and

"(ii) identify the antitrust investigator or investigators who shall conduct the examination.".

(e) Subsection (c) of section 3 is amended to read as follows:

"(c) Such demand shall—

"(1) not require the production of any information that would be privileged from disclosure if demanded by, or pursuant to, a subpena issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation; and

"(2) (A) if it is a demand for production of documentary material, not contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation; or

"(B) if it is a demand for answers to written interrogatories, not impose an undue or oppressive burden on the person required to furnish answers.".

(f) Subsection (f) of section 3 is redesignated subsection (h) and the following new subsections are inserted immediately following subsection (e):

"(f) Service of any such demand or of any petition filed

under section 5 of this Act may be made upon any natural person by—

"(1) delivering a duly executed copy thereof to the person to be served; or

"(2) depositing such copy in the United States mails, by registered or certified mail duly addressed to such person at his residence or principal office or place of business.

"(g) Service of any such demand or of any petition filed under section 5 of this Act may be made upon any person who appears to the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, not to be found within the territorial jurisdiction of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. If such person has had contacts with the United States that were sufficient to, or if the conduct of such person has so affected the trade and commerce of the United States as to, permit the courts of the United States to assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this Act by such person that it would have if such person were personally within the jurisdiction of such court.".

(g) Section 3 is further amended by inserting the following new subsections immediately after redesignated subsection (h):

"(i) The production of documentary material in response to a demand for production thereof shall be made under a sworn certificate, in such form as the demand designates, by a person or persons having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material described by the demand which is in the possession, custody, or control of the person to whom the demand is directed, or to which he or it has reasonable access, has been produced and made available to the custodian.

"(j) Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath, by a person or persons having knowledge of the subject matter thereof, and it shall be submitted under a sworn certificate, in such form as the demand designates, to the effect that all information required by the demand which is in the possession of the person to whom the demand is directed, or to which he or it has reasonable access, has been furnished.

"(k) (1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and

affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. Upon certification the officer before whom the testimony is taken shall promptly transmit the transcript of the testimony to the possession of the antitrust investigator or investigators conducting the examination. The antitrust investigator or investigators conducting the examination may exclude from the place where the examination is held all persons other than the person being examined, his counsel, the officer before whom the testimony is to be taken, and any stenographer taking said testimony. The provisions of the Act of March 3, 1913 (Ch. 114, 37 Stat. 731; 15 U.S.C. 30) shall not apply to such examinations.

"(2) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon between the antitrust investigator or investigators conducting the examination and such person.

"(3) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied by counsel. For any purposes other than those set forth in this paragraph, such person shall not refuse to answer any question, nor by himself or through counsel interrupt the examination by making objections or statements on the record. Such person or counsel may object on the record, briefly stating the reason therefor, whenever it is claimed that such person is entitled to refuse to answer on grounds of privilege or other lawful grounds. If such person refuses to answer any question on the grounds of privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18, United States Code. If such person refuses to answer any question, the antitrust investigator or investigators conducting the examination may request the district court of the United States for the judicial district within which the examination is conducted to order such person to answer, in the same manner as if such person had refused to answer such question after having been subpenaed to testify thereto before a grand jury, and upon disobedience to any such order of such court, such court may punish such person for contempt thereof.

"(4) Upon completion of the examination, any person examined under a demand for oral testimony may clarify

or complete answers otherwise equivocal or incomplete on the record.

"(l) The antitrust investigation procedures specified in this section shall be deemed within the scope of sections 371 and 1001, title 18, United States Code, and such sections shall be applicable to any written or oral statement, or other act or omission, made or done in the course of such antitrust investigation procedures."

(h) Subsection (b) of section 4 is amended by inserting in the first sentence immediately after the word "demand", first appearance, the words "for the production of documents", and by amending the second sentence to read as follows: "Such person may upon written agreement between such person and the custodian substitute true copies for originals of all or any part of such material.".

(i) Subsection (c) of section 4 is amended by inserting in the first sentence immediately after the word "material" the words "described in subsection (b) (2) of section 3", and by inserting in the fourth sentence immediately before the word "documentary" the word "such".

(j) Subsection (d) of section 4 is amended to read as follows:

"(d) (1) Whenever any attorney of the Antitrust Division of the Department of Justice has been designated to appear before any court, grand jury, or Federal adminis-

trative or regulatory agency in any case or proceeding or to conduct any antitrust investigation, the antitrust investigator or investigators having custody and control of any documentary material described in subsection (b) (2) of section 3, interrogatories served pursuant to this Act and answers thereto, or transcript of oral testimony taken pursuant to this Act may deliver to such attorney such documentary material, interrogatories and answers thereto, or transcript of oral testimony for use in connection with any such case, proceeding or investigation as such attorney determines to be required. Upon the completion of any such case, proceeding, or investigation such attorney shall return to the antitrust investigator or investigators any such materials so delivered and not having passed into the control of such court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

"(2) The Antitrust Division, while participating in any Federal administrative or regulatory agency proceeding, may employ the authority granted by this Act to obtain information or evidence for use in such proceeding.".

(k) Subsection (e) of section 4 is amended to read as follows:

"(e) Upon the completion of (1) the antitrust investigation for which any documentary material described in subsection (b) (2) of section 3 of this Act was produced, and

(2) any such case or proceeding, the custodian shall return to the person who produced such material all such material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) which has not passed into the control of any court, grand jury, or Federal administrative or regulatory agency through the introduction thereof into the record of such case or proceeding.".

(l) Subsection (f) of section 4 is amended to read as follows:

"(f) When any documentary material has been produced by any person under a demand described in subsection (b) (2) of section 3 of this Act, and no case or proceeding as to which the documents are usable had been instituted and is pending or has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in charge of the Antitrust Division, to the return of all such documentary material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) so produced by such person.".

(m) Subsection (g) of section 4 is amended to read as follows:

"(g) In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced under a demand for production described in subsection (b) (2) of section 3 of this Act or the antitrust investigator having possession of answers in writing to written interrogatories or the transcript of any oral testimony produced under any demand issued under this Act, or the official relief of such custodian or antitrust investigator from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian of such documentary material or to maintain possession of such answers to interrogatories or such transcript of oral testimony, and (2) transmit in writing to the person who submitted the documentary material produced under a demand for production described in subsection (b) (2) of section 3 of this Act, notice as to the identity and address of the successor so designated. Any successor designated under this subsection shall have with regard to such materials all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be

held responsible for any default or dereliction which occurred before his designation.".

(n) Subsection (a) of section 5 is amended by striking out all the words following the word "Act", and by striking out the comma after the word "Act" and inserting in lieu thereof a period.

(o) The first sentence of subsection (b) of section 5 is amended to read as follows:

"(b) Within twenty days after the service of any such demand upon any person, or at any time before the compliance date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such compliance date as may be prescribed in writing, subsequent to service, by an antitrust investigator named in the demand, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the antitrust investigator or investigators named in the demand a petition for an order of such court modifying or setting aside such demand.".

(p) The second sentence of subsection (b) of section 5 is amended by striking out the final period and inserting a colon in lieu thereof, and by inserting immediately after the colon the words: "*Provided, however*, That such person shall

promptly comply with such portions of the demand not sought to be modified or set aside.".

(q) Subsection (b) of section 5 is amended by inserting the following sentence at the end thereof: "Any such ground not specified in such a petition shall be deemed waived unless good cause is shown for the failure to assert it in such a petition.".

(r) Subsection (a) of section 6 is amended by inserting in the third "whoever" paragraph between the words "any" and "documentary" the words "any oral or written information or", and by inserting between the third and fourth "whoever" paragraphs the following:

"Whoever knowingly and willfully withholds, falsifies, or misrepresents, or by any trick, fraud, scheme, or device conceals or covers up, a material part of any oral or written information or documentary material which is the subject of a demand pursuant to the Antitrust Civil Process Act, or attempts to or solicits another to do so; or".

SEC. 202. The provisions of this title shall be effective on the date of enactment of this Act, and may be employed in respect of acts, practices, and conduct that occurred prior to the date of enactment thereof.

TITLE III—FEDERAL TRADE COMMISSION ACT AMENDMENTS

SEC. 301. Section 10 of the Federal Trade Commission Act (38 Stat. 724; 15 U.S.C. 50) is amended as follows:

(a) The first sentence of the third paragraph is amended to read as follows:

"If any person, partnership, or corporation required by this Act to file any annual or special report or to obey any subpoena shall fail so to do within the time fixed by the commission for filing or obeying the same, and such failure shall continue for fifteen days after notice of such default, the person, partnership, or corporation shall forfeit and pay to the United States a civil penalty of not less than $1,000 nor more than $5,000 as the court may determine, for each and every day of the continuance of such failure. Such forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the Commission, brought, in the case of a corporation or partnership, in the district where the corporation or partnership has its principal office or in any district in which it shall do business, and, in the case of any other person, in the district where such person resides or has his principal place of business.".

(b) Immediately following the third paragraph, insert the following new paragraph:

"No action to stay accumulation of any of the penalties provided by the preceding paragraph of this section or to enjoin the Commission or the United States from enforcement of any subpoena or any Commission order to file any annual or special report may be commenced until after the

service of a notice of default by the Commission as provided in the preceding paragraph. No court shall issue any order staying the accumulation of such penalties unless the party seeking such relief shall have first demonstrated:

"(1) a substantial probability of ultimate success on the merits;

"(2) that such party will be irreparably injured unless the accumulation of such penalties is stayed; and

"(3) that the equities clearly favor such stay.

No court shall issue an order enjoining the Commission or the United States from enforcement of any subpoena or any order to file an annual or special report unless the plaintiff shall have first demonstrated:

"(1) that such subpoena or order to file a special or annual report is unduly burdensome; or

"(2) that the information sought by such subpoena or order to file a special or annual report is not reasonably relevant to the inquiry being conducted by the Commission.

The Commission shall have authority to determine its own jurisdiction to conduct investigations or to adjudicate complaints in the first instance, unless such investigation or adjudication is expressly prohibited by this Act.".

TITLE IV—PARENS PATRIAE

SEC. 401. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730; 15 U.S.C. 12), is amended by inserting immediately following section 4B the following new sections:

"SEC. 4C. (a) Any attorney general of a State may bring a civil action in the name of such State in the district courts of the United States under section 4 or 16, or both, of this Act, and such State shall be entitled to recover damages and secure other relief as provided in such sections—

"(1) as parens patriae of the persons residing in that State, with respect to damages sustained by such persons, or alternatively, if the court finds in its discretion that the interests of justice so require, as a representative of a class or classes consisting of persons residing in that State, who have been damaged; or

"(2) as parens patriae, with respect to damages to the general economy of that State or any political subdivision thereof: *Provided*, That such damages shall not be duplicative of those recoverable under paragraph (1) of this subsection; or

"(3) on behalf of any or all political subdivisions of

that State with respect to damages sustained by such political subdivisions.

"(b) (1) Whenever the attorney general of a State institutes an action pursuant to paragraph (a) (1) of this section, he shall within thirty days thereafter cause notice thereof to be published in the manner prescribed by State statute or rule of court for publication of legal notice in such State, or, in the absence of an applicable State statute or rule of court, in such manner as the district court shall by general rule prescribe. No further publication or notice shall be required in respect to such actions.

"(2) Any person may exclude from an action instituted pursuant to paragraph (a) (1) of this section his or its claim for relief in respect of the subject matter of such action, by filing a statement to such effect with the court in which such action has been instituted. Such statement shall be filed within thirty days after publication of notice required by paragraph (1) of this subsection, in such form as the district court shall by general rule prescribe. The claims of only those persons filing such statements shall be excluded from such action. The claims for relief in respect of such subject matter of all other persons residing in such State shall be included in such action, and the final judgment in such action shall be res judicata as to such claims.

"(c) In any action under subsection (a) of this section, the State—

"(1) may recover the aggregate damages sustained by the persons or political subdivisions on whose behalf the State sues without separately proving the individual claims of each such person or political subdivision; and proof of such damages shall be permitted on the basis of any or all of the following:

"(A) statistical or sampling methods;

"(B) the pro rata allocation of—

"(i) illegal overcharges, or

"(ii) excess profits—

to sales occurring within the State; or

"(C) such other reasonable system of estimating aggregate damages as the court in its discretion may permit; and

"(2) shall distribute, allocate, or otherwise pay out of the fund so recovered either (A) in accordance with State law, or (B) in the absence of any applicable State law, as the district court may in its discretion authorize. Such distribution procedure shall afford each person or political subdivision on whose behalf the State sues a reasonable opportunity individually to secure the pro rata portion of the fund attributable to his or its respec-

tive claims for damages, less litigation and administrative costs, including attorneys' fees, before any such fund is escheated or used for general welfare purposes.

"SEC. 4D. (a) Whenever the Attorney General of the United States has brought an action under this Act, and he has reason to believe that any State attorney general would be entitled to bring an action based substantially on the same cause of action pursuant to section 4C of this Act, he shall promptly so notify such State attorney general.

"(b) If, after the ninety-day period which begins on the date of the mailing of any notification under subsection (a) of this section, the State attorney general fails or declines to bring such an action, the Attorney General may himself bring such action in place of the State attorney general, and he shall thereafter be deemed parens patriae of the persons residing in such State for the purposes of such action. Such action shall be brought in the district in which the action under section 4A is pending and shall be consolidated therewith.

"(c) In actions brought under this section, section 4C (c) (1) shall apply with respect to proof of damages by the Attorney General. Subject to subsection (d) of this section, section 4C (c) (2) shall apply to any amounts paid to States pursuant to this subsection.

"(d) With respect to any recovery of damages under

this section, the Attorney General shall pay or cause to be paid to the respective States, on behalf of the persons residing in such States for whom he has recovered such damages, a pro rata share of the total damages recovered, after deducting therefrom, on the basis of regulations prescribed by the Attorney General and approved by the Comptroller General of the United States, litigation expenses, including actual attorneys' fees and administrative costs. Any amounts so deducted shall be deposited in a special fund by the Attorney General, and, subject to an appropriation, used only for activities under this section.

"SEC. 4E. With respect to any federally funded State program affected by antitrust violations, any State shall be entitled to treble damages for the entire amount of overcharges or other damages sustained in connection with such a program. The Attorney General of the United States shall have the right to intervene in any such action, to protect the interests of the United States; and he shall have the power to sue for treble damages on behalf of any State that fails or declines to bring such action within the ninety-day period which begins on the date of the mailing of notification from the Attorney General that he believes cause exists for bringing such action. The United States shall be entitled to secure reimbursement of its actual expenses, if any, and of its equitable share of any recovery of damages under this section. If

the United States brings a separate action for its damages sustained in connection with the program, and recovers such damages, the defendant in such action shall be entitled to set such recovery off against any amount recovered by a State in respect of the same damages. The provisions of sections 4C (c) and 4D (c) and (d) of this Act shall apply to any action and damages recovered therein pursuant to this section."

SEC. 402. (a) As used in this title, the term "State" shall include the District of Columbia, and the term "attorney general of a State" shall include the Corporation Counsel of the District of Columbia.

(b) The provisions of this title shall apply to all civil actions filed under the antitrust laws, in which a State is plaintiff, that are pending on the date of enactment of this Act or that are hereafter filed, including those in which the cause of action accrued before the date of enactment of this Act.

TITLE V—PREMERGER NOTIFICATION

SEC. 501. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730; 15 U.S.C. 12), is amended by adding a new section 23 to read as follows:

"PREMERGER NOTIFICATION

"SEC. 23. (a) Notwithstanding any other provision of law, no person or persons shall acquire, directly or indirectly, the whole or any part of the stock or other share capital or of the assets of another person or persons, if the acquiring person or persons, or the person or persons the stock or assets of which are being acquired, or both, are engaged in commerce or in any activity affecting commerce, and—

"(1) (A) the acquiring person or persons have total assets or annual net sales in excess of $100,000,000; and

"(B) the person or persons the stock or assets of which is being acquired have total assets or annual net sales in excess of $10,000,000; or

"(2) the combined total assets or annual net sales of the acquiring person or persons and the person or persons the stock or assets of which is being acquired are in excess of $100,000,000—

until expiration of the notification and waiting period specified in subsection (b) (1) of this section.

"(b) (1) The notification and waiting period required by this section shall expire sixty days after the persons subject to subsection (a) of this section each file with the

Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereafter referred to in this section as the 'Assistant Attorney General') duplicate originals of the notification specified in paragraph (2) of this subsection, or until expiration of any extension of such period pursuant to subsection (c) (2) of this section, whichever is later, except as may otherwise be authorized pursuant to subsection (c) (4) of this section.

"(2) The notification required by this section shall be in such form and contain such information and documentary material as the Federal Trade Commission, after consultation with the Assistant Attorney General, shall be general regulation prescribe, after notice and submission of views, pursuant to section 553 of title 5, United States Code.

"(3) The Federal Trade Commission, after consultation with the Assistant Attorney General, is authorized and directed to require the filing of a premerger notification report at least thirty days prior to the effective date of an acquisition by any person or persons engaged in commerce, or in any activities affecting commerce, and not subject to subsection (a) of this section.

"(4) The Federal Trade Commission, after consultation with the Assistant Attorney General, is authorized and directed to define the terms used in this section, prescribe

accounting methods for reporting thereunder, by general regulation except classes of persons and transactions from the notification requirements thereunder, and to promulgate rules of general or special applicability as may be necessary or proper to the administration of this section, insofar as such action is not inconsistent with the purposes of this section, after notice and submission of views, pursuant to section 553 of title 5, United States Code.

"(c) (1) The Federal Trade Commission, pursuant to the Federal Trade Commission Act, or the Assistant Attorney General, pursuant to the Antitrust Civil Process Act, may, prior to the expiration of the periods specified in subsections (b) (1) and (b) (3) of this section, require the submission of additional information and documentary material relating to the acquisition by any person or persons subject to the provisions of this section, or by any officer, director, or partner of such person or persons.

"(2) If such information and documentary material is not produced in full within the time specified, the Federal Trade Commission or the Assistant Attorney General may, in its or his discretion, extend the periods specified in subsections (b) (1) and (b) (3) of this section for an additional period of up to thirty days beyond the date on which it or he notifies such person, officer, director, or partner that it or he is satisfied that the information or documentary material

has been produced. If such notification as to production is unreasonably withheld, any person entitled to such notification may secure a declaration to such effect by way of civil action instituted in the United States District Court for the District of Columbia.

"(3) No provisions of this section shall limit the power of the Federal Trade Commission or the Assistant Attorney General to secure, at any time, information or documentary material from any person, including third parties, pursuant to the Federal Trade Commission Act or the Antitrust Civil Process Act.

"(4) The Federal Trade Commission and the Assistant Attorney General may waive the waiting periods provided in this section or the remaining portions thereof, in particular cases, by publishing in the Federal Register a notice that neither intends to take any action within such periods in respect of the acquisition.

"(d) If, within the notification and waiting period specified in subsection (b) (1) of this section, a proceeding is instituted by the Federal Trade Commission or an action is filed by the United States, alleging that an acquisition violates section 7 of this Act, or sections 1 or 2 of the Sherman Act (15 U.S.C. 1–2), and either the Federal Trade Commission or the Assistant Attorney General certifies to the United States district court within which the respondent

resides or carries on business, or in which the action is filed, that it or he believes that the public interest requires relief pendente lite pursuant to this subsection, the court shall enter an order that such acquisition shall not be consummated until the order of the Commission in respect thereof or the judgment entered in such action has become final, and that the proceeding or action shall be in every way expedited.

"(e) Failure of the Federal Trade Commission or the Assistant Attorney General to request additional information or documentary material pursuant to this section, or failure to interpose objection to an acquisition within the periods specified in subsections (b) (1) and (b) (3) of this section, shall not bar the institution of any proceeding or action, or the obtaining of any information or documentary material, with respect to such acquisition, at any time under any provision of law.

"(f) (1) Whenever any person violates or fails to comply with the provisions of subsection (a) of this section, such person shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each day during which such person directly or indirectly holds stock or assets, in violation of this section. Such penalty shall accrue to the United States and may be recovered in a civil action brought by the United States.

"(2) Whenever any person fails to furnish information

required to be submitted, pursuant to subsection (e) (1) of this section, such person shall be liable for the penalties provided for noncompliance with the provisions of the Federal Trade Commission Act or the Antitrust Civil Process Act, whichever is applicable.

"(g) In any proceeding instituted or action brought by the Federal Trade Commission or the United States alleging that an acquisition violates section 7 of this Act, or sections 1 or 2 of the Sherman Act, upon application of the Federal Trade Commission or the Assistant Attorney General to the United States district court within which the respondent resides or carries on business, or in which the action is filed, such court shall, as soon as practicable, enter an order establishing the purchase price of the acquired stock or assets, requiring the acquiring person or persons to maintain the personnel, assets, stock or firm being acquired as a separate entity, and requiring the profits of the acquired firm, stock, or assets to be placed in an escrow account, pending the outcome of the proceeding or action. Upon entry of a final order or judgment that the acquisition is in violation of section 7 of this Act, or sections 1 or 2 of the Sherman Act, the court shall order the divestiture of the unlawfully acquired assets or stock. If divestiture is by sale, it shall be at a price not to exceed the purchase price. Any profits held in escrow

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shall be transferred with the stock or assets unlawfully acquired.".

SEC. 502. The provisions of this title shall be effective one hundred and twenty days after the date of enactment of this Act. Effective upon the date of enactment of this Act, the Federal Trade Commission is authorized to carry out the requirements of sections 23 (b) (2) and (b) (4) of the Clayton Act, as amended by this Act.

TITLE VI—NOLO CONTENDERE

SEC. 601. Section 5 (a) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 16 (a)), is amended to read as follows:

"5 (a) (1) A final judgment heretofore or hereafter entered in any civil action or criminal proceeding brought by the United States under the antitrust laws, finding or concluding that a defendant has violated said laws, or is guilty of an offense under said laws, shall be prima facie evidence against such defendant in any civil action brought by any person against such defendant under said laws, as to all matters respecting which said judgment would be an estoppel as between the parties thereto, except as provided in paragraph (3) of this subsection.

"(2) (A) A plea of nolo contendere hereafter entered in a criminal proceeding under the antitrust laws shall be

prima facie evidence against such defendant in any civil action brought by any person against such defendant under said laws, as to all matters in the indictment necessary to sustain a judgment of conviction upon a jury verdict that the defendant was guilty of the offense charged in the indictment.

"(B) When a plea of nolo contendere is used as provided by subparagraph (A) of this paragraph, the bill of particulars filed in the proceeding may be used to interpret or construe the indictment, and any statement made in court on behalf of the defendant in connection with the entry of such plea may thereafter be received in evidence against the defendant as an admission.

"(3) The provisions of paragraph (1) of this subsection shall not apply to a consent judgment entered before any testimony has been taken, or to a judgment entered in an action brought by the United States under section 4A of this Act.".

SEC. 602. The provisions of section 5(a)(2) of the Clayton Act, as amended by this title, shall apply to all criminal proceedings that are pending on the date of enactment of this Act or that are hereafter filed, including those in which the offense was committed before the date of enactment of this Act.

TITLE VII—MISCELLANEOUS

AFFECTING COMMERCE

SEC. 701. Sections 2, 2a, 3, and 7 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 13, 13a, 14, and 18), are amended by striking out the words "in commerce" wherever the term appears and inserting in lieu thereof the words "in or affecting commerce".

COMPLEX CASES

SEC. 702. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12), is amended by adding a new section 21 as follows:

"COMPLEX CASES

"SEC. 21. In any civil action brought in any district court of the United States under the antitrust laws, or any other Acts having like purpose that have been or hereafter may be enacted, wherein the United States is plaintiff and equitable relief is sought, the Attorney General may file with the court, prior to the entry of final judgment, a certificate that, in his opinion, the case is a complex antitrust case. Upon filing of such certificate, it shall be the duty of the

judge designated to hear and determine the case or the chief judge of the district court if no judge has as yet been designated, to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. Special masters, economic experts, and other personnel may be designated to assist the trial judge in the expeditious and efficient trial of the case, and in expediting discovery and pre-trial matters. Economic and other experts may be used by the court in all phases of the trial, including the preparation and analysis of plans for relief.".

FOREIGN ACTIONS

SEC. 703. The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12), is amended by adding a new section 22 as follows:

"FOREIGN ACTIONS

"SEC. 22. In any civil action or proceeding before any court of the United States, involving any act to regulate interstate or foreign trade or commerce, or to protect the same against unlawful restraints or monopolies, in which the court orders any party thereto or any person in privity with such party to furnish discovery, evidence, or testimony, and such party or person refuses, declines, or fails to do so on the ground that a foreign statute, order, regulation, decree,

or other law prohibits compliance with such order, the court may enter an order forthwith against such party, dismissing all or some of such party's claims, striking all or some of such party's defenses, or otherwise terminating the proceeding or any portion thereof adversely as to such party.".

SEVERABILITY

SEC. 704. If any provision of this Act, or the application of any such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

EFFECTIVE DATE

SEC. 705. (a) Section 701 of this title shall apply to acts, practices, and conduct occurring after the date of enactment of this Act.

(b) Section 702 of this title shall apply to all actions on file on the date of enactment of this Act or hereafter filed.

(c) Section 703 of this title shall apply to all actions on file on the date of enactment of this Act or hereafter filed, in respect of noncompliance with discovery orders hereafter entered. Nothing contained in this subsection shall be deemed to limit the authority of any court to reenter any discovery order heretofore entered, and thereby make such section 703 applicable thereto.

(d) Unless otherwise specified, the effective date of this Act shall be the date of enactment thereof.

[Congressional Record, 94th Cong., 1st sess.]

By Mr. PHILIP A. HART (for himself and Mr. HUGH SCOTT):

S. 1284. A bill to improve and facilitate the expenditious and effective enforcement of the antitrust laws. Referred to the Committee on the Judiciary.

Mr. PHILIP A. HART. Mr. President over the past 186 years, the document protecting our personal freedoms—the Constitution—has acquired 25 amendments. In 85 years the laws protecting our economic freedom—the antitrust laws—have been augmented really only five times.

A persuasive argument could be made that some attention should be paid to bringing the antitrust laws up to date. That argument has been made by the Attorney General's Task Force Report in 1955; by the Neal Task Force under President Johnson; and by the Stigler Task Force under President Nixon. And that argument has been made over recent years before the Senate Antitrust and Monopoly Subcommittee. And, at times we have considered various bills which would have updated the laws in a piecemeal fashion.

For many reasons—the times, the pressure of other interests, or something—the bills have met with varying degrees of success. Some passed one House. Some were killed by vote. Some never got to a vote.

But today there is a new interest in the antitrust laws. Pressured by inflation and recession together, the administration, the Department of Justice, and many outstanding Members of Congress have turned to the antitrust laws as—if not the savior—at least as a warrior in the battle.

In my opinion—and admitting my own prejudice—I think this is a wise move. But there is no question that, if we expect the antitrust laws to carry our banner into battle, we had best inspect their equipment to make sure it is in the best order.

Unfortunately, I do not believe it is.

Therefore, the distinguished minority leader (Mr. HUGH SCOTT), and I today introduce the Antitrust Improvements Act of 1975 which we think would apply the spit and polish to put the laws in order.

Mr. President, I ask unanimous consent that the text of the bill be printed at the conclusion of my remarks. Let me highlight some of the parts here.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. PHILIP A. HART. Title I, the preamble, reiterates this Nation's dedication to free, competitive enterprise as the best way to protect social, political, and economic freedom and to produce the best buys at the best prices.

Title II amends the Antitrust Civil Process Act. Ninety percent of this title was incorporated in a bill submitted by the administration during the second session of last Congress. Basically, it would allow the Department of Justice to issue antitrust civil process to individuals as well as corporations and to third parties. Also, currently the Antitrust Division is handicapped because it cannot obtain the information necessary to evaluate a merger in advance of the merger taking place. The present authorization for civil investigative demands allows their issuance only when a violation of law may have been committed. Obviously, when a merger is announced and not yet consummated—even if it would violate the antitrust laws—no violation has yet occurred. Therefore, we would amend the law in order to allow the Department to obtain in advance of a merger full information on which to decide if the merger should be challenged.

It also permits the taking of depositions and written interrogatories as well as documentary evidence. Mr. President, I ask unanimous consent that the text of the April 4, 1974, letter from the Attorney General to the Vice President be printed in full in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. PHILIP A. HART. Title III amends the Federal Trade Commission Act to provide increased penalties for not obeying FTC special orders or subpenas. In 1914—when establishing the Federal Trade Commission—Congress set the penalty at $100 a day. It has not been changed since. This title would set the penalty at not more than $5,000 nor less than $1,000 per day. Title III also codifies case law respecting enforceability and enjoining of Commission compulsory process and the accumulation of civil penalties for failure to comply with such process.

Title IV is the parens patriae section. This permits State attorneys general to file antitrust actions and to collect treble damages on behalf of the citizens of their States. A similar bill has been introduced on the House side and has been the subject of hearings. The provision authorizing the Attorney General to file such an action when a State attorney general does not, precipitated substantial debate

in the House hearings. The provision is included in this bill in the hope of eliciting further comment on the issue before making a final judgment of its merits. Particular comment also is invited on the notice and opting out provisions of the title.

Title V requires the Federal Trade Commission to broaden and keep in force its premerger notification reporting requirement. A 30-day notice period to the Commission and the Department of Justice is required. Giant corporations—those with assets or sales of more than $100 million—are required to wait 60 days when planning to merge with or acquire a corporation with assets of $10 million or more. If an antitrust action challenging the legality of the proposed merger or acquisition is brought during this 60-day period by the Government, the Government is authorized to block the merger until its legality is determined by the courts. These concepts were proposed in Congress in the mid-1950's. In fact, a similar bill passed the House in 1956 and was reported by the Senate Antitrust and Monopoly Subcommittee but failed to clear the Senate Judiciary Committee.

Mr. President, currently $1 out of every $4 consumers spend goes to buy products, produced by a concentrated industry. Much of this concentration developed not from hardnose competition but from gobbling up a competitor rather than going out and establishing new competition. The Government simply has inadequate tools to deal with mergers before they are consummated.

Until recently, the only method the Antitrust Division and Federal Trade Commission had to be aware of pending mergers or acquisitions was to read the general and trade press.

In other words, if the Wall Street Journal missed one, so well may the Federal Trade Commission and the Antitrust Division. Under FTC's recently required merger notification provisions, it now receives certain information from merging companies having combined sales or assets of at least $250 million. But, little can be done to prevent illegal mergers even upon learning of them.

Anyone who has looked at the problems in undoing a merger knows that, if the merger is not to be allowed, all—the country and the companies—would be much much better off if it is never born.

Title VI would clarify the status of the nolo contendere plea relative to a private antitrust suit. As we all know, a plea of nolo contendere in a criminal action makes the defendant liable to all punishment that would befall him if he pleaded guilty—including a jail term. However, traditionally, a nolo plea in antitrust has bought escape from one thing: use as prima facie evidence in private treble damage suits that a crime had been committed. This bill would end that discrimination.

Title VII is a miscellaneous section which does basically three things: First, the reach of the Clayton Act is extended to activities in or affecting commerce, just as the Congress broadened the reach of the Federal Trade Commission Act last year; second, expedited procedures, special masters, and economic and other experts are provided for complex antitrust cases; and third, authority and sanctions to deal with situations involving the refusal of foreign corporations to comply with United States court orders are vested in the Judiciary.

Mr. President, it is my intension to move to hearings on this bill in the Antitrust and Monopoly Subcommittee as soon as possible—hopefully in the next 2 months.

The changes are important. I think they are needed. And over the past 20 years, most have been discussed in great depth. Extensive hearings would not be necessary for Congress to work its will on this bill.

Mr. Hugh Scott. Mr. President, I am delighted to be sponsoring the Antitrust Improvements Act of 1975 with Senator Hart.

I have always been a vigorous supporter of our antitrust laws. Our system works best when we have full competition. Competition produces a wide variety of products at the lowest possible prices for the consumer and industry. This is the reason why I have already sponsored legislation in this Congress to repeal the fair trade laws and to increase the budgets of the Justice Department and the Federal Trade Commission for more antitrust enforcement.

It is important to emphasize that President Ford has already called for more vigorous antitrust enforcement. Effective use of the antitrust laws can be a positive method to bring down high prices and to control inflationary tendencies in our economy.

The bill introduced today advances some significant changes which can expedite antitrust action by the Government. I understand there may be some adverse comments and I look forward to full and complete hearings on each of the issues raised. If after hearings a significant doubt exists as to the viability of a particular part of the bill, I would certainly reevaluate my current position. However, at this time I believe the bill would help vigorous antitrust enforcement.

The legislation recommends a number of ideas that have been discussed for years by those involved in the antitrust field. It would make a plea of nolo contendere in a criminal antitrust action available as evidence in a private antitrust case. Fines for failure to comply with an FTC subpena or special order would be increased for the first time in 50 years. A method would be set forward to have notice of large mergers or acquisitions with power in the Attorney General under certain cases to forestall mergers pending court determination. State attorneys general will be permitted to file antitrust suits on behalf of citizens or their States—similar to class action suits. In large antitrust cases, the bill allows for the use of special masters and other experts to speed their resolution. The Antitrust Division is permitted to issue civil investigative demands to individuals as well as companies. This would also apply to demands in advance of a merger. Finally, the bill would increase the effectiveness of our antitrust laws to foreign corporations that do business in the United States.

All of these proposals deserve study and I hope we will seek quick action by the Senate. Antitrust laws have traditionally acted as a check upon a tendency of corporations in some industries not to compete. Because we do not live in a perfect world, we need antitrust laws now more than ever before. The consumer can only benefit from their just and thorough application. The Antitrust Improvements Act of 1975 will move us quickly in that direction.

94TH CONGRESS
1ST SESSION

S. 1637

IN THE SENATE OF THE UNITED STATES

MAY 5 (legislative day, APRIL 21), 1975

Mr. FONG (for himself, Mr. PHILIP A. HART, and Mr. HUGH SCOTT) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Antitrust Civil Process Act to increase the effectiveness of discovery in civil antitrust investigations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Antitrust Civil Process Act (76 Stat. 548; 15 U.S.C. 1311) is hereby amended as follows:

(a) Clause (c) of section 2 is amended to read as follows:

"(c) The term 'antitrust investigation' means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has

been engaged in any antitrust violation or in any activities which may lead to any antitrust violation;".

(b) Clause (f) of section 2 is amended by deleting the phrase "not a natural person" and inserting immediately after the word "means" the following: "any natural person or".

(c) Subsection (a) of section 3 is amended to read as follows:

"Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have knowledge of any fact or facts, relevant to a civil antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for examination or to answer in writing written interrogatories or to give oral testimony, or any combination of such demands, pertaining to such fact or facts.".

(d) Subsection (b) of section 3 is amended to read as follows:

"Each such demand shall—

"(1) state the nature of the conduct constituting

the alleged antitrust violation which is under investigation and the provision of law applicable thereto; and

"(2) if it is a demand for production of documentary material,

"(A) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainly as to permit such material to be fairly identified;

"(B) prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

"(C) identify the antitrust investigator who shall be the custodian to whom such material shall be made available; or

"(3) if it is a demand for answers to written interrogatories,

"(A) identify the antitrust investigator to whom such answers shall be made;

"(B) propound with definiteness and certainty the written interrogatories to be answered; and

"(C) prescribe a date at which time answers to written interrogatories shall be made; or

"(4) if it is a demand for the giving of oral testimony,

"(A) prescribe a date, time, and place at which oral testimony shall be taken; and

"(B) identify the antitrust investigator or investigators who shall conduct the examination.".

(e) Subsection (f) of section 3 is redesignated subsection (g) and a new subsection is inserted following subsection (e) to read as follows:

"(f) Service of any such demand or of any petition filed under section 5 of this Act may be made upon any natural person by—

"(1) delivering a duly executed copy thereof to the person to be served; or

"(2) depositing such copy in the United States mails, by registered or certified mail duly addressed to the person to be served at his residence or principal office or place of business.".

(f) Section 3 is further amended by adding the following new subsections after redesignated subsection (g):

"(h) The production of documentary material in response to a demand for production described in subsection (b)(2) of this section shall be made under a sworn certificate to the effect that all of the documentary material described by the demand which is in the possession, custody,

or control of the person to whom the demand is directed has been produced and made available to the custodian.

"(i) Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objections shall be stated in lieu of an answer. The answers and objections are to be signed by the person making them.

"(j) (1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. Upon certification the officer before whom the testimony is taken shall promptly transmit the transcript of the testimony to the possession of the antitrust investigator or investigators conducting the examination. The antitrust investigator or investigators conducting the examination may exclude from the place where the examination is held all persons other than the person begin examined, his counsel, the officer before whom the testimony is to be

taken, and any stenographer taking said testimony. The provisions of the Act of March 3, 1913 (ch. 114, 37 Stat. 731; 15 U.S.C. 30), shall not apply to such examinations.

"(2) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon between the antitrust investigator or investigators conducting the examination and such person.

"(3) Any person examined under a demand for oral testimony pursuant to this section shall, on payment of lawfully prescribed costs, procure a copy of his own testimony as stenographically reported, except that such person may for good cause be limited to inspection of the official transcript of his testimony.

"(4) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied by counsel. For any purposes other than those set forth in this subparagraph, such person shall not refuse to answer any question, nor by himself or through counsel interrupt the examination by making objections or statements on the record. Such person or counsel may object on the record, stating the reason therefor, where it is claimed that such person is entitled to refuse to answer on grounds of privilege, or self-incrimination or other lawful grounds.

Where the refusal to answer is on the grounds of privilege against self-incrimination, the testimony of such person may be compelled in accord with the provisions of part V of title 18, United States Code. Upon a refusal to answer, the antitrust investigator or investigators conducting the examination may petition the district court of the United States for the judicial district within which the examination is conducted for an order requiring such person to answer.

"(5) Upon completion of the examination, the person examined may clarify or completely answers otherwise equivocal or incomplete on the record.".

(g) Subsection (b) of section 4 is amended by inserting in the first sentence immediately after the word "demand", first appearance, the following: "for the production of documents", and by amending the second sentence to read as follows: "Such person may upon written agreement between such person and the custodian substitute copies for originals of all or any part of such material.".

(h) Subsection (c) of section 4 is amended by inserting in the first sentence immediately after the word "material" the phrase "described in subsection (b) (2) of section 3" and by inserting in the fourth sentence immediately before the word "documentary" the word "such".

(i) Subsection (d) of section 4 is amended to read as follows:

"(1) Whenever any attorney of the Antitrust Division of the Department of Justice has been designated to appear before any court, grand jury, or Federal administrative or regulatory agency in any case or proceeding or to conduct any antitrust investigation, the antitrust investigator or investigators having custody and control of any documentary material described in subsection (b) (2) of section 3, interrogatories served pursuant to this Act and answers thereto, or transcript of oral testimony taken pursuant to this Act may deliver to such attorney such documentary material, interrogatories, and answers thereto, or transcript of oral testimony for use in connection with any such case, proceeding, or investigation as such attorney determines to be required. Upon the completion of any such case, proceeding, or investigation such attorney shall return to the antitrust investigator or investigators any such materials so delivered and not having passed into the control of such court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

"(2) The Antitrust Division, while participating in any Federal administrative or regulatory agency proceeding, shall not employ the authority granted by this Act to obtain information or evidence for use in such proceeding where an adequate opportunity for discovery is available under

the rules and procedures of the agency conducting the proceeding.".

(j) Subsection (e) of section 4 is amended to read as follows:

"Upon the completion of (1) the antitrust investigation for which any documentary material described in subsection (b) (2) of section 3 of this Act was produced, and (2) any such case or proceeding, the custodian shall return to the person who produced such material all such material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) which has not passed into the control of any court, grand jury, or Federal administrative or regulatory agency through the introduction thereof into the record of such case or proceeding.".

(k) Subsection (f) of section 4 is amended to read as follows:

"When any documentary material has been produced by any person under a demand described in subsection (b) (2) of section 3 of this Act, and no case or proceeding as to which the documents are usable has been instituted and is pending or has been instituted within a reasonable time after completion of the examination and analysis of

all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in charge of the Antitrust Division, to the return of all such documentary material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) so produced by such person.".

(l) Subsection (g) of section 4 is amended to read as follows:

"In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced under a demand for production described in subsection (b) (2) of section 3 of this Act or the antitrust investigator having possession of answers in writing to written interrogatories or the transcript of any oral testimony produced under any demand issued under this Act, or the official relief of such custodian or antitrust investigator from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian of such documentary material or to maintain possession of such answers to interrogatories or such transcript of oral testimony, and (2) transmit in writing to the person who submitted the

documentary material produced under a demand for production described in subsection (b) (2) of section 3 of this Act, notice as to the identity and address of the successor so designated. Any successor designated under this subsection shall have with regard to such materials all duties and responsibilities imposed by the Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation.".

(m) The first sentence of subsection (b) of section 5 is amended to read as follows:

"Within twenty days after the service of any such demand upon any person, or at any time before the compliance date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such compliance date as may be prescribed in writing, subsequent to service, by the antitrust investigator or investigators named in the demand, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such antitrust investigator or investigators a petition for an order of such court modifying or setting aside such demand.".

By Mr. FONG (for himself, Mr. HUGH SCOTT, and Mr. PHILIP A. HART):

S. 1637. A bill to amend the Antitrust Civil Process Act to increase the effectiveness of discovery in civil antitrust investigations, and for other purposes. Referred to the Committee on the Judiciary.

Mr. FONG. Mr. President, today I am introducing a bill to amend the Antitrust Civil Process Act to increase the effectiveness of discovery in civil antitrust investigations.

I believe it is incontestable that no field of litigation involves facts more complex or records more extensive than are found in the Government's antitrust cases. As a consequence, the task of amassing the data essential to successful antitrust enforcement can frequently be of enormous magnitude.

The Antitrust Civil Process Act of 1962, as far as it goes, has been of great benefit to the Government in conducting civil antitrust investigations. That act authorized the Attorney General or the Assistant Attorney General in charge of the Antitrust Division to issue a civil investigative demand for the production of relevant documents from corporations, associations, partnerships, or other legal entities not natural persons, under investigation for antitrust violations.

However, the Antitrust Civil Process Act does not allow natural persons or third parties not under investigation to be served with a civil investigative demand, nor does it give the Antitrust Division the power to comple oral testimony or serve written interrogatories. Experience has shown, unfortunately, that these and other deficiencies have rendered the act insufficient to meet the present-day investigatory needs of the Antitrust Division.

The refusal of industry on occasion to cooperate voluntarily in antitrust investigations, which was the original justification for the Antitrust Civil Process Act is the reason today why more effective means of civil discovery are needed. In a word, the same reasons that supported enactment of the Antitrust Civil Process Act 13 years ago speak now for the act's expansion.

Mr. President, in the opinion of the Attorney General, Mr. Edward H. Levi—

"This bill would simply make available to the Attorney General the same antitrust investigatory powers in civil investigations that he now has in criminal investigations, and provide him with authority similar to that of the Federal Trade Commission."

As you know, the grand jury process can be used in the investigation of criminal violations under the Sherman Act. The Clayton Act for the most part is not a criminal statute, however, and the grand jury process, of course, is unavailable where only a civil action is contemplated.

Even under the restraint of trade or monopoly provisions of the Sherman Act, it is often not desirable to bring companion criminal and civil suits. The facts may not warrant criminal sanctions, or it may appear at the outset that the evidence may be insufficient for a criminal ease. In other situations the urgency of obtaining civil relief may make it inadvisable to risk the delay that would probably attend the bringing of both types of actions.

Let me now set forth in detail the eight improvements in the Antitrust Civil Process Act through which this legislation would increase the effectiveness of the Government's civil antitrust discovery process.

First. Under present law, civil investigative demands can be issued only in aid of investigations of past or present antitrust violations. The limitations of this authority become manifest when a merger possibly violative of the antitrust laws is announced which the Antitrust Division cannot fully investigate because such merger has not yet been consummated. By allowing the civil investigative demand to be used with regard to activities which may lead to an antitrust violation, my bill would permit the Justice Department to obtain in advance of a merger sufficient information on which to make a judgment as to whether or not it should be challenged.

This provision corrects the adverse effect of *United States* v. *Union Oil Company of California* (343 F. 2d 29, 9th Cir., 1965), which held that civil investigative demands may issue only to require the production of documents relating to current or past, but not incipient, violations.

It should be noted that there is no lack of legislative precedent for extending the investigatory power to possible future violations. In addition to my own State of Hawaii, the States of Illinois, Missouri, New Jersey, New York, and Virginia, among others, specifically authorize the use of civil investigative subpenas in investigations of incipient violations of the antitrust laws.

Second. The bill would broaden the categories of persons upon whom civil investigative demand could be served to include natural persons. As I noted

earlier, the limitation in the present law to corporations, associations, partnerships, and other legal entities not natural persons has proved a hindrance to effective antitrust investigation.

Third. My bill would also broaden the classes of persons subject to civil investigative demands to include not only persons under investigation but also third parties who may have knowledge of facts which are relevant to the investigation. Again, this remedies a long-felt defect in the powers granted under existing law.

Fourth. The civil investigative demand could be used not only to compel the production of documentary evidence but would become available to require oral testimony or answers to written interrogatories or any combination of such demands.

Broadening the act to cover oral testimony would introduce no novel or untried concept in antitrust enforcement. In the area of trade regulation on the Federal level, section 9 of the Federal Trade Commission Act confers on the Commission the power to compel oral testimony in the course of its investigations. Among departments and other agencies whose heads, members, or employees have statutory authority to compel attendance and oral testimony of witnesses in the course of investigations pertinent to laws which they administer are the Departments of Agriculture, Labor, the Treasury, and Health, Education, and Welfare, the Civil Aeronautics Board, the Federal Aviation Administration, the Federal Communications Commission, the Federal Power Commission, the Interstate Commerce Commission, the National Labor Relations Board, the Railroad Retirement Board, the Tariff Commission, and the Veterans' Administration.

The power to seek the attendance of witnesses to give oral testimony in anti-trust investigations prior to the initiation of any suit or proceeding is granted to the State attorney general under the laws of Arizona, Connecticut, Florida, Hawaii, Illinois, Kansas, Louisiana, Maine, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, South Carolina, Texas, Virginia, and Wisconsin. These jurisdictions also extend the civil investigative subpena power in antitrust investigations to individuals as well as to artificial persons and provide for service upon persons capable of providing relevant testimony whether or not they are the actual target of the investigation.

Fifth. Persons subject to a civil investigative demand for oral testimony in antitrust investigations may be accompanied by counsel and may refuse to answer questions on the basis of privilege, self-incrimination or other lawful grounds. Where the refusal to answer is on the grounds of self-incrimination, however, the testimony of such person may be compelled in accordance with the provisions of part V of title 18 of the United States Code, the Federal immunity statute..

Sixth. My bill permits the use of evidence obtained through civil investigative demand in antitrust inquiries in investigations, proceedings or cases other than the one to which the demand specifically relates. This eliminates the doubt on this point raised by the decision in an unreported case decided by the U.S. District Court for the District of Columbia, *Upjohn* v. *Bernstein* (DCDC Civil Action No. 1322–66, 1966). However, the Antitrust Division is prohibited from using this authority to obtain information or evidence for use in any Federal administrative or regulatory agency proceeding where an adequate opportunity for discovery is available under the rules and procedures of the agency conducting the proceeding.

Seventh. The bill specifically sanctions the Department's existing practice of requiring certification of compliance with a demand for production of documentary material by the person to whom the demand is directed.

Eighth. Finally, my bill authorizes the Department of Justice to extend the period in which persons served may judicially contest a civil investigative demand. This would permit more time for extending and facilitating negotiations for production of evidence, thereby possibly obviating the need for full production and possibly reducing the likelihood of resort to the court by either the party served or the Government.

Mr. President, I ask unanimous consent that the text of my bill be printed in the RECORD at this point.

SENATOR BAYH AMENDMENT TO S. 1284

Amendment intended to be proposed by Mr. Bayh to S. 1284, a bill to improve and facilitate the expeditious and effective enforcement of the antitrust laws, viz: On page 36, after line 2, insert the following:

TITLE VIII—SHERMAN ACT AMENDMENTS

SEC. 801. The Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 1), as amended, is amended by inserting the following new sections:

"SEC. 3A. Every person who shall by means that are criminal or fraudulent, engage in conduct specifically intended to exclude or contribute to excluding any other person from engaging in any trade or business, in the manufacture or sale of any product, or in any other commercial activity, shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding $1,-000,000 if a corporation, or if any other person, $100,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. Such conduct shall be deemed in violation of this section whether or not such trade, business, manufacture, sale, or other commercial activity is deemed a line of commerce or relevant market, or the exclusion of such person from such activity would be deemed to confer a monopoly upon the defendant in such action or proceeding or to come dangerously close to doing so.

"SEC. 3B. Any corporation which violates sections 1, 2, 3 or 3A of this Act shall forfeit and pay to the United States a civil penalty of not more than 20 per centum of the gross revenue received by such corporation during the period of such violation. Such forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit brought by the Attorney General. The court may exclude from such gross revenue such amounts as the corporation establishes, by a preponderance of evidence, to be wholly unrelated to the lines of commerce or portions thereof related to such violation. The remedy provided by this section is in addition to, and not in lieu of, the remedies or penalties provided by other provisions of this Act and other statutes. The time for commencing actions founded upon this section shall be that prescribed for actions for money damages founded upon a tort, as provided by sections 2415 and 2416 of the Judicial Code (28 U.S.C. 2415–2416).".

Mr. BAYH. Mr. President, I am today submitting an amendment to S. 1284, the Antitrust Improvement Act of 1975, which Senators Philip A. Hart and Hugh Scott introduced earlier in this Congress. The amendment is in two parts. Section 3A would extend the Sherman Act's remedies and penalties to any criminal or fraudulent action taken with an intent to exclude others from engaging in business. Section 3B would permit the United States to recover from corporations violating the Sherman Act up to 20 percent of the revenues received from the sale of products related to the violation.

EXCLUSIONARY PRACTICES

Section 3A of my amendment would extend the Sherman Act's remedies and penalties to all criminal or fraudulent actions that are intentionally taken to exclude others from the marketplace. This type of predatory conduct would be actionable regardless of whether the victims' business constitutes any specific line of commerce or relevant market, and regardless of whether the party engaging in this unreasonable and anticompetitive conduct achieves, comes near to achieving, or even could achieve, a true economic "monopoly" position by its action. No longer would a "dangerous" probability of success" have to be proven as to these actions.

This amendment is necessary because of some recent court decisions. These have taken the position that the present Sherman Act provisions do not penalize attempts at monopolization, or other efforts to exclude others from the marketplace—no matter how pernicious the conduct—unless it can be established that there exists a specific market segment which the defendant was seeking to capture, which can be defined in terms of costly economic surveys as to cross-elasticity of demand and supply, and like data, and that the defendant, had it fully carried out its intended actions, could have succeeded in capturing a "monopoly" of that market segment. This view is exemplified in the recent case *Acme Precision Products, Inc.*, v. *American Alloys Corp.*, 484 F. 2d 1237 (8th Cir. 1973). The better view, however, endorsed by my proposal, is expressed in *Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459 (9th Cir.), certiorari denied, 377 U.S. 993 (1964), and has been supported by the Department of Justice as *amicus curiae* in *Highland Dairy, Inc.*, v. *The Kroger Co.*, May 26, 1969.

Competition is the lifeblood of our Nation. All efforts to remove or destroy or exclude competitors are antagonistic to our Nation's heritage. As the late Mr. Justice Black once observed, monopoly should "not be tolerated merely because the victim is just one merchant whose business is so small that his destruction

makes little difference to the economy," for predatory conduct which tends to create monopoly conditions should be suppressed whether "the tendency is a creeping one" or "one that proceeds at full gallop," *Klors, Inc.*, v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213–14 (1959). See also *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947). Whether exclusionary actions are taken by a firm that becomes or could become a monopolist, or by a firm that would never achieve or come dangerously close to achieving full monopoly power, the conduct and effect on the competitor aimed at is the same and should come under the scrutiny and remedies of our antitrust laws.

CIVIL PENALTIES

Mr. President, monopolists today can engage in anticompetitive conduct and still not risk effective prosecution by our Government. For this reason, I am proposing a new section 3B to supplement the Sherman Antitrust Act's penalties by permitting the Attorney General to sue corporate violators of that act for civil penalties.

Our present law permits the Government to bring three types of suits against Sherman Act violators: Criminal actions, suits seeking injunctions, and suits seeking single damages for actual injuries sustained. Often, it may be considered inappropriate to bring a criminal action for the activity complained of, even though it may be highly antisocial, anticompetitive, and criminal. This may be because the conduct has never been held previously to be a violation of the act, or because it is not a recognized "per se" violation. In such a circumstance, it may be unlikely that a jury or court would convict the violator, and a judgment of acquittal cannot be appealed to a higher court. If it were a civil case, however, the Government could take an appeal to correct what may have been an erroneous decision at the trial court level.

Similarly, there are other cases in which the Government would not find it appropriate to bring an injunctive suit. The violator may have discontinued and abandoned its anticompetitive conduct, after the Government brought the matter to light, so that there is nothing necessary to enjoin. Moreover, it is often the case that the Government itself does not suffer actual damages, and thus would not sue for them, although the damage to the general public may be significant.

There is therefore often a crack between present civil and criminal remedies, into which the conduct falls. It is too late to bring an ordinary civil case in equity, but not yet a clear enough occasion of illegality for a criminal case. Yet the corporation may have profited handsomely from the illegal acts.

The civil penalty provision I propose would correct these problems by permitting the Government to sue the violator for up to 20 percent of the revenues it gained from sales of the restrained product or services, and which thus directly relate to its anticompetitive behavior. Each violation of the Sherman Act would then be met by an appropriate remedy that would afford the necessary relief. No longer would the Government's hands be tied when it seeks to prosecute these violations of our antitrust laws.

Further reasons compel the addition of the proposed provision. The fines that our present law provides, even as recently raised to a $1 million maximum, are not always enough to act as a deterrent to this brand of crime. To the corporations that drive out of business those who wish to compete with them, and to those that take hundreds of millions of dollars from our pocketbooks by monopolistically controlling the prices we pay, even the maximum fine we now provide is just a license fee, which they may pay for the privilege of violating our laws and can treat as a cost of doing business. Nor is the threat of a damage suit by an injured party sufficient to deter this behavior. Treble damage suits were provided in 1914 by the original Clayton Act; yet violations of our antitrust laws have continued unabated. Largely, this is because damages in a civil suit need to be proven with precision, after lengthy, expensive, and burdensome litigation that the injured party often lacks the stamina or capital to endure. Furthermore, the present damage provisions do not compensate the general public for the higher prices it paid and continues to pay, and the general injury to competition it suffered and continues to suffer.

Under our present system of remedies and penalities, corporations can still gain economically by violating the law. The maximum amount by which the last Congress increased the fines that corporations must pay for violating our antiturst laws is minute in comparison to the profits which corporations can make by violating those laws. Yet, this is the only major change in penalties for corporations we have provided in over 85 years of continuing monopolistic practices. Plainly, our present remedies and penalties are insufficient.

My proposal would add more teeth to our antitrust laws. Our Government's hands will no longer be tied. At the same time, recovery of up to 20 percent of the violator's ill-gained revenues will make it far less likely that at present that the violator will still gain economically by committing anticompetitive and predatory acts. By providing the Attorney General as the one to enforce this additional remedy we will assure a strong litigating arm for the public, and assure that the public's damage is compensated.

For justice to be done, our Government must be a strong enforcer of the laws, and the profits that the violator takes from the public must, at the very least, be returned to the public.

Senator HART. These hearings are on the Antitrust Improvements Act of 1975—S. 1284—introduced on March 21 by the distinguished minority leader (Mr. Hugh Scott—R–Pa.) and myself, and on S. 1637, a bill to amend the Antitrust Civil Process Act introduced by Senator Hiram Fong, and cosponsored by Senator Scott and myself.

Senator Bayh has advised me that yesterday he introduced an amendment to S. 1284: (1) To allow the United States to recover a civil penalty of up to 20 percent of revenues received by corporations from the sale of products related to the antitrust violation, and (2) to extend the Sherman Act's remedies and penalties to any criminal or fraudulent action taken with an intent to exclude others from engaging in business. This type of predatory conduct would be actionable regardless of whether the perpetrator is a monopolist or is coming dangerously close to becoming one. The subcommittee will provide copies of the amendment to each witness, and would like to receive written comments from each witness.

When we refer to the antitrust laws, we are usually referring to a major legislative event occurring in one of three years:

In 1890, the Sherman Act was enacted to rid the country of monopoly power and to prevent conduct in restraint of trade.

In 1914, the Clayton Act was enacted to supplement the Sherman Act by proscribing incipient violations of the antitrust laws and by preventing anticompetitive mergers. Also, in 1914, the Federal Trade Commission Act became law.

Thirty-six years later, in 1950, to plug the tremendous loophole in the antimerger provisions of Section 7 of the Clayton Act, the Celler-Kefauver Act was passed.

Throughout the years, of course, other changes have been made to the antitrust laws, including last year's increased criminal penalties of up to $1 million for corporations and up to a three-year felony for natural persons convicted of violating the antitrust laws. Essentially, however, our free enterprise system is protected by antitrust legislation enacted in 1890, 1914, and 1950.

Throughout this period, virtually each President and Congress has expressed their respective commitment to the antitrust laws as the preserver of our free enterprise system. Most recently, President Ford said:

"Competition—I think it is good in politics, I think it is good in athletics, and I think competition is the key to productivity and innovation.

* * * * * * *

"Vigorous antitrust action must be part of the effort to promote competition."

Have our antitrust laws effectively maintained our free enterprise system? Regretfully, I have concluded that they have not. Throughout the years, our economy has become more and more concentrated and less and less competitive. Mergers have continued unabated. Restrictive practices have increased. Imaginative defense counsel have been able to successfully stall the investigatory process, and to drag out enforcement actions for so many years until the damage to the economy is irreparable and the ultimate vindication of the Government moot. Government interference in the marketplace through regulation—both of a necessary and unnecessary kind—has proliferated.

I have no illusion that enactment of S. 1284 either in the short run or the long run will assure the degree of competition necessary to restore the free enterprise system. But I have no doubt that without its passage neither the Government nor the private attorneys general will have even a fighting chance to prevent its further erosion.

Its enactment should improve significantly the ability of the Antitrust Division, the Federal Trade Commission, and the State attorneys general to investigate and deter violations, and to take effective and expeditious remedial action when violations have occurred. Although separate and distinct from each other, the bill's 7 titles are interrelated and should accomplish this objective when taken as a whole. In summary:

Title I represents a Congressional reaffirmation of the free enterprise system and the need for vigorous enforcement of the antitrust laws.

Title II amends the Antitrust Civil Process Act to allow the Antitrust Division to issue civil investigative demands to individuals, as well as to corporations, and to third parties, to issue such process before a merger is consummated, and to investigate antitrust violations through the taking of depositions and written interrogatories. These powers have been requested by former Attorney General William B. Saxbe and by Attorney General Edward H. Levi.

Title III amends Section 10 of the Federal Trade Commission Act to provide increased penalties for not obeying FTC special orders or subpoenas. In 1914—when establishing the Federal Trade Commission—Congress set the penalty for disobeying an FTC special order at $100 a day. It has not been changed since. Title III sets the penalty at not more than $5,000 nor less than $1,000 per day, and codifies existing case law as to the enforceability and enjoining of FTC compulsory process, and the accumulation of civil penalties for failure to comply with such process. These provisions should expedite FTC antitrust proceedings which now are routinely delayed for many months during the subpoena enforcement phase. They also should allow for the efficient and expeditious determination of the validity of an FTC special order—rather than piecemeal litigation in several forums now occurring in FTC's line-of-business program.

Title IV amends the Clayton Act to permit State attorneys general to file antitrust treble damage actions as parens patriae of the citizens of their State, and for damage to the general economy of their State. This amendment is required because of a narrow construction given Section 4 of the Clayton Act by the courts. Without this provision substantial illegal profits from violations of the antitrust laws are wrong-

fully retained by the antitrust violator. Because of the small amount of each consumer's claim and the class action actual notice requirement of Rule 23, these overcharges simply cannot be recovered by consumers.

Title V requires the Federal Trade Commission to broaden and keep in force its premerger notification reporting requirement. Corporations with total assets or annual net sales of more than $100 million are required to provide 60 days notice before acquiring or merging with another corporation having total assets or annual net sales of $10 million or more, or if the combined assets or sales of the acquiring and acquired companies exceeds $100 million. If the Justice Department or Federal Trade Commission files suit challenging the legality of the proposed merger or acquisition within such period, the Court is authorized to prevent consummation of the merger upon request of the Government until the validity of the merger is adjudicated. Authority to waive the 60-day period and to exempt certain types of transactions (e.g., de minimus non-control investments, formation of subsidiary companies, real estate acquisition for office space) is conferred upon the antitrust authorities. Future challenges to a merger under Section 7 are not barred by failure to file suit during the 60-day period.

Premerger notification and related provisions were passed by the House of Representatives during the 84th Congress, by the Senate Judiciary Committee during the 84th Congress, by the House Judiciary Committee during the 85th Congress, and by the Senate Antitrust and Monopoly Subcommittee on three prior occasions. The concept had the support of President Eisenhower and former Attorneys General Herbert Brownell and Robert F. Kennedy. In 1969, the Neal Commission report went even further, prohibiting the acquisition by any large firm of any leading firm.

Title VI amends the Clayton Act and allows a plea of nolo contendere in a criminal case to be used as prima facie evidence in private antitrust cases. A plea of nolo contendere in a criminal action makes the defendant liable to all punishment that would befall him if he pleaded guilty—including a jail term. However, a nolo plea in an antitrust case has bought escape from one thing: use as prima facie evidence of the offense charged in private treble damage suits. The result is a needless duplication of discovery and wasteful litigation after the Government is prepared to meet a higher burden of proof in the criminal case. And, even with the newly enacted stiffer criminal penalties, the deterrent value and respect for the law is lost upon acceptance of a nolo plea. The overwhelming majority of criminal cases are disposed of by a plea of nolo contendere. Only in the rarest of cases does a defendant serve a jail term—and then the norm is 30 days, with the maximum term never imposed. Similarly, in few cases has the maximum fine been imposed.

For these reasons, under Presidents Eisenhower and Johnson, the policy of the Justice Department was to oppose the entry of a nolo plea in criminal antitrust cases. Attorney General Robert Kennedy said:

"Our general policy will be to oppose pleas of nolo contendere by defendants in price-fixing cases. When such pleas are accepted, the cases are disposed of without having the facts aired in court. Also, a

conviction or a plea of guilty is prima facie evidence which can be used . . . in suit for damages."

Regretfully, the courts accepted the pleas in 75 percent of the cases. Thus, in 1966, Assistant Attorney General Donald Turner supported legislation allowing use of a nolo plea as prima facie evidence in civil antitrust cases, stating:

"Nevertheless, since we do not believe that nolo pleas should be accepted where they are offered solely in order to escape treble damage liability, we believe that any additional expenditure in staff resulting from the enactment of such a provision would be justified."

Title VII contains some miscellaneous provisions: (1) the reach of the Clayton Act is extended to activities in or affecting commerce, just as the Congress broadened the reach of the Federal Trade Commission Act last year; (2) expedited procedures, special masters, and economic and other experts are provided for complex antitrust cases; and (3) authority and sanctions to deal with situations involving the refusal of foreign corporations to comply with United States court orders in antitrust cases are vested in the judicial branch. This provision is similar to that in the administration patent bill (S. 1308) and is responsive to actions in recent antitrust litigation involving foreign drug companies.

The changes in S. 1284 are important. I think they are needed. And over the past 20 years, most have been discussed in great depth. I look forward to the constructive suggestions I am sure the hearing process will elicit, and hope the Antitrust Division and the Federal Trade Commission will provide their expert assistance to the subcommittee as it seeks to perfect the bill. I welcome any suggestions the Government's antitrust officials may have for further amending this bill to improve the effectiveness of our antitrust laws.

Finally, let me express my hope that before this Congress finishes its work, the Subcommittee and Congress will consider and act in four other areas of importance: (1) A redefinition of monopoly power to include oligopoly power, and the removal of the element of intent from the monopolization offense—either through the Industrial Reorganization Act, which I shall reintroduce this month, or through amendments to the Sherman Act; (2) legislation not too dissimilar from the Public Utility Holding Company Act of 1935 to restructure the major petroleum companies both vertically and horizontally; (3) the repeal of unnecessary exemptions from the antitrust laws for regulated industries and enactment of a specialized antitrust standard to be applied to such industries; and (4) enactment of legislation increasing substantially the funds authorized for antitrust enforcement activities.

Senator Hruska?

OPENING STATEMENT OF ROMAN L. HRUSKA, A U.S. SENATOR FROM THE STATE OF NEBRASKA, RANKING REPUBLICAN, ANTITRUST AND MONOPOLY SUBCOMMITTEE

Senator Hruska. Mr. Chairman, I would like to reserve the privilege of inserting a prepared statement.

Prepared Statement of Senator Hruska

Mr. Chairman, I seriously question the wisdom of this Subcommittee in considering S. 1284 in its present form with seven titles, six of which contain legislative language that was the subject of individual bills in previous Congresses.

Title II, the Antitrust Civil Process Act Amendment, more popularly referred to as the Civil Investigative Demand Law of the 87th Congress, was the subject of hearings in the 85th, 86th and 87th Congresses and was not enacted into law until the Senate accepted the House version, which version deleted the very language that this bill is attempting to restore, among other points. If we must reexamine the Civil Investigative Demand issue, we should do so in a bill such as H.R. 39, which deals with that one subject alone rather than confuse the printed record with such serious issues as: 1) Premerger Notification, 2) Nolo Contendere, 3) Parens Patriae, 4) Federal Trade Commission Act Amendments, 5) Complex Cases, 6) Foreign Actions, and 7) Transactions Affecting Commerce.

This Senator realizes that eight listed subject matters are not of the same significance but they are of such great importance that our colleagues on the House Judiciary Committee have thus far held separate hearings on two bills, H.R. 38—Parans Patriae and H.R. 39—Antitrust Civil Process Act Amendments—although a companion bill in the House to S. 1284 has been introduced shortly after the introduction of S. 1284. We should stop and consider the wisdom of the House Judiciary Committee, by studying each of six titles of S. 1284 as separate and distinct legislative hearings on separate bills. Confusion will reign if we do otherwise.

For example, the Attorney General of the several states testified in 1974 in unison on the Parens Patriae bill, which is similar to Title IV of the instant bill. We must assume from previous views of State Attorneys General that there will be a serious difference of opinion among the Attorneys General as an organization or individually, on such other titles as Pre-Merger Notification and/or Nolo Contendere, Civil Investigative Demand, Foreign Actions, or Trade Commission Act Amendments. We do know that Assistant Attorney General Thomas Kauper, head of the U.S. Antitrust Division, testified that he had some reservations about the Parens Patriae bill in the House. He also may have reservations about other titles of S. 1284 even though he strongly recommends amending the Antitrust Civil Process Act.

To compound the confusion, we may be faced with the American Bar Association and other Bar Associations, or the U.S. Chamber of Commerce or National Association of Manufacturers which will find themselves in the same predicament as Mr. Kauper and be forced to testify that they may see good in title 3 but titles 2, 4, 5, 6, and 7 are destructive.

One may say that such testimony, though confusing, would be weeded out, but when you do follow such procedure in one legislative bill, instead of the seven separate bills that would normally be introduced—as the House is doing—then it becomes more difficult.

Various witnesses will have strong opinions in favor of one title but just as strong views against another title. Their testimony either in direct or cross-examination could cause the defeat of the entire bill, whereas if the various titles were handled in separate and distinct bills, that testimony that caused the defeat of the bill would never have been a part of the record of the hearings.

To prove my point, lets reflect on S. 782 of the 93rd Congress where three different and distinct issues were placed in one bill—1) Consent Decrees, 2) Increased Penalties and 3) Amending the Expediting Act. The reason that was done because Increased Penalties and the Expediting Act provisions had passed both Houses but time ran out before their differences were resolved. Yet with that background S. 782 almost died on the last day because of a dispute between the House and the Senate on certain language in the Expediting Act portion of the bill. The House agreed to take a Senate amendment to avoid a Senate-House Conference which would have killed the bill.

With the history of S. 782 before us, one can imagine what confusion would reign when we have seven key issues in seven different titles rather than one rolled into one bill, when we surely can anticipate key witnesses from Government, industry, and trade and Bar Associations—who may be in favor of some titles but strongly against other key titles.

Mr. Chairman, within a reasonable time after May 8th, I shall ask the chairman that a meeting of the Subcommittee members be convened that we may discuss some surgery to the bill S. 1284, so that the key titles of the bill be separated and reintroduced into individual bills, as some are now pending for the House Committee. I believe such procedure would be consistent with good legislative process.

Senator HRUSKA. I will make only one or two brief comments.

One is that this bill embraces four or five concepts that are deeply rooted in the antitrust laws of the Nation. Each of them is complicated,

far reaching, massive in its impact upon almost every phase of American life—business, social, political—and we have them grouped together in one bill.

We have them grouped together in one bill so that witnesses come here with almost a scattergun approach inasmuch as they have to devote parts of their statements and their testimony to that many propositions if they want to cover the field.

So it is a burden on them. It's a burden on the committee here to try to reach an intensive, selective, and a proper zeroing in on the issues of each of these propositions.

I don't know that it is the best way to legislate. In due time when we have an executive meeting of the Subcommittee on Antitrust and Monopoly, I shall make an effort and proposal that we treat these individually and not as an omnibus bill.

On that idea, I will expound a little bit more and have already started my opening statement which I will insert.

There is another aspect to this morning's hearing. I say it almost sorrowfully, Mr. Chairman; it wasn't until yesterday afternoon at 3 o'clock and at 5 o'clock, respectively, that this Senator received in his office—I was still on duty when they came—the statements of the principal witnesses.

I know they are busy men. I doubt they can be more busy than Senators, but I do know we have a committee rule, and that is to put these statements in, sufficiently in advance, so that at least we are given a chance to read them and consider them, put them in their perspective, refer to some of our notes on earlier hearings and get into the historical legislation to check off different points that are raised by the statement in either instance.

I know of no more complicated a legal concept than antitrust law. If there is, it might be patent law where we deal with nuts and bolts.

And to come into a hearing like this and just off the top of our heads try to treat with care the scholarly presentations of witnesses, is a most difficult thing. I think it is a little too demanding to expect of any member of any committee.

For that reason, Mr. Chairman, I do not propose to question either of the witnesses, neither the Chairman of the FTC nor the head of the Antitrust Division of the Justice Department. I don't think it would be fair to them; I don't think it would be fair to me, the committee, or to anybody who is going to read the record.

The questions should be considered, they should be in their proper context, they should be searching, they should be perceptive. And again I want to say there may be some on this committee that have those types of instant reaction powers and they can get at it.

If they do, God bless them, and may their kind increase, but I am not of that category, and I doubt very much that I will be able to learn seven topics all in one morning on the basis of the presentations which I have not seen until this morning, although the document came to my office last night.

It may strike some people as odd that perhaps Senators have other duties than to take care of only the business before the Antitrust and Monopoly Committee. If that is news to anyone, let them accept it as such, but I have other things to attend to besides it.

So I say this not in anger, but in sadness. Mr. Chairman. This issue has come up again and again repeatedly, and I say it with sadness

and with some regret, but I'm going to say it and I am going to abide by the course of conduct which I follow.

Senator HART. Well, the Chair was and is an understanding, sympathetic audience of the statement of the Senator from Nebraska. The rule is, 48 hours before the hearing all statements must be submitted to the subcommittee. Due to the importance of this hearing, the letters of invitation to the witnesses, signed by me, specified that statements be filed by May 2, and it is like much else around here. We pass a law and that is that.

It leaves the committee no alternative than to respect the perfectly legitimate point made by the Senator from Nebraska, and as a consequence, as we conclude with the witnesses today, we would ask their return in order that the Senator from Nebraska, after having had an opportunity to study the testimony, may ask questions at such time as he requests.

Is our opening witness, Senator Haskell, here? [No response.]

Senator HART. Our next witness is the able Chairman of the Federal Trade Commission, Lewis A. Engman.

Let me, in the case of all the witnesses, direct that the testimony that has been filed, be printed in the record in full. As witnesses proceed, if they would like to add or summarize, they are free to do so.

STATEMENT OF LEWIS A. ENGMAN, CHAIRMAN, FEDERAL TRADE COMMISSION, WASHINGTON, D.C.

Mr. ENGMAN. Thank you, Mr. Chairman.

I am happy to be up here this morning to express the views of the Federal Trade Commission on this pending legislation. I want to emphasize that the statement which has been submitted to the subcommittee represents the unanimous view of the members of the Commission.

In that connection, I have to plead guilty to the charges that Senator Hruska levied.

Senator HRUSKA. Oh, they are not charges, Mr. Chairman. They are observations. I would not be so abrasive as to charge anyone on that.

Senator HART. They are just expressions in sorrow.

Mr. ENGMAN. I noted that. I would only like to make the observation that some of the advantages and disadvantages of collegial bodies are that they are both more deliberative and more time consuming.

The problem which I face in certain instances is whether or not I can meet the deadline of the committee on my own or defer to the views of my colleagues, which sometimes means that things get up inexcusably late.

I would, of course, be happy to come back or to respond in writing [1] to any questions which either Senator Hruska or other members of the committee may have.

I do not propose to read my statement. I would ask that it be inserted in the record.[2]

I do think, that in general terms, the purpose of the bill which is designed to strengthen antitrust enforcement, is a laudatory one and

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[1] See p. 656.
[2] See p. 69.

a goal which I and all of my colleagues on the Commission certainly endorse.

From an institutional viewpoint, I briefly want to refer to one section of the bill which is of particular importance to the Commission, and that is title III.

I think it is no secret that the Commission has had difficulties enforcing compulsory process, and while it appears that some of these refusals may be without substantial legal or factual justification, we are forced into very time-consuming procedures with no real penalties.

We believe that the provisions of title III will go a way toward helping us speed up our enforcement process and to limit claims to those which are truly legitimate or are based on substantial grounds.

And with that very brief statement, Mr. Chairman, I would be happy to attempt to respond to any questions that you might have.

Senator HART. I am delighted that the statement that you've filed was the unanimous position of the Commission.

Mr. ENGMAN. Sometimes unanimity takes a little bit longer.

Senator HART. I understand. And in connection with title III, I think I will use this opportunity to express to you and through you to him, the appreciation of the subcommittee to your former General Counsel, Calvin Collier.

He provided us with an excellent draft legal analysis of the present case law, and he sketched graphically the time that is involved in the enforcement of subpenas. We wish him well in his assignment as General Counsel of OMB.

When the Commission completes both drafts, we would welcome it for the record.

Mr. ENGMAN. The only document I have at the present time is the same draft which you have been provided. We can finalize it and submit it to the committee and the staff for your consideration.[1]

Senator HART. At this point, since I am going to ask the staff to ask the questions they have developed, it would be normal for me to ask Senator Hruska if he has any questions. But I think this is the time where you want to indicate that you would want Chairman Engman back.

Senator HRUSKA. Yes; if I have not already done so, and that would apply to the head of the Antitrust Division.

Senator HART. Mr. Nash?

Mr. NASH. Thank you, Mr. Chairman.

Chairman Engman, as I read your statement, you support the concept of treble-damage actions by State attorneys general as parens patriae on behalf of the individual citizens of the respective States.

But you raise the question of whether notice by publication would be fair or satisfy the requirements of due process. The recourse to actual notice, of course, would bring us back to the class action requirements of rule 23, which is one of the primary reasons for title 4 of the bill.

At hearings before the House Judiciary Committee, Assistant Attorney General Kauper testified on the question of whether actual notice is required, and he hypothesized that a respectable argument could be made that due process is not necessarily synonymous with actual notice, but also could be whether reasonable representation is afforded and whether consumers would have any legal recourse without this concept.

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[1] See p. 658.

Would you be able to elaborate on your analysis of the question you raised about the constitutionality of the lack of an actual notice provision?

Mr. ENGMAN. Yes; I'd be happy to. First of all, I would take note of the fact that Mr. Halverson, who is the Director of our Bureau of Competition, also addressed some of the points in earlier testimony, and by and large my personal views coincide with his.

Obviously when I'm responding to questions, although my statement is a Commission statement, these are my views, and they do, by and large, correspond with Mr. Halverson's.

I, first of all, on the basic principle, believe that citizens should not be denied relief in these kinds of situations just because the individual harm may be too small to justify individual proceedings.

And it is on that basis that I support the concept of parens patriae action.

The question which I raised with respect to publication, as you will note—in fact, you did, Mr. Nash—was not necessarily meant to cover in all instances.

I at least raise the question—which I confess I don't have the answer to—as to whether or not publication would be all that was necessary for every conceivable circumstance.

And without attempting to outline every one, I can at least hypothesize a kind of situation where there may be relatively small damages or injury to a broad class of individuals and a substantially greater injury to a much narrower class of individuals.

I raise the question whether in that kind of situation a court might not find that due process requires something greater than just publication of notice if it were to bar the rights of someone in this smaller class.

Without attempting to delineate further, it is conceivable that there could be some damages flowing from purchase, let us say, of a kind of drug which is taken on a broad scale in relatively small amounts and by a more limited number of people in much larger amounts—are they entitled to something more than publication prior to the time that they are cut off in terms of any claim?

I am not saying that I think it would be constitutionally required in all instances. My own view coincides generally with the views expressed by Mr. Kauper on the prior bill.

I just raise the possibility as to whether consideration should be given to some kind of alternative or whether this completely answers it. It certainly goes a step further than that contained in the bill on which Mr. Halverson and Mr. Kauper previously testified.

Mr. NASH. Do you think it would be practicable for the bill to include a concept of defining a maximum or a minimum limit on damages to each individual and a maximum or minimum number of individuals to be encompassed within a class?

Mr. ENGMAN. That is conceivable. I am always uneasy with those kinds of limits in this kind of legislation. Certainly I prefer a more flexible approach. I have not, frankly, thought about that as an approach.

Senator HART. Mr. Chairman, everybody's schedule is complicated, but I just see Senator Haskell. I wonder if his schedule is such that he would like to proceed now.

Senator HASKELL. No, Mr. Chairman. Why don't you let this gentleman finish. I just had the time wrong. I guess you started before my calendar said you would.

Senator HART. And we started later than we were supposed to.

Mr. ENGMAN. I would be very happy, of course, to give the time.

Senator HART. No. That is OK.

Mr. NASH. Mr. Chairman, another question you raise is the concept of whether it is wise public policy to allow recovery for damages to the general economy of a State.

Again, you raise the question whether such damages can realistically be separated from damages suffered by individuals to insure that there is no duplicative recovery.

In the State of North Carolina treble damage action against some antibiotic companies, its damage claim for damages to the general economy of the State revolved around loss of tax revenues.

Taking that as an example, is that the kind of concept you are concerned might not be able to be separated from individual damage claims?

Mr. ENGMAN. Well, to the extent that there could be calculation of some of those kinds of damages, then I think that might be a separate class of instances.

I have to confess that, particularly in the light of the *Hawaii* case, the courts have frankly not had to wrestle with this issue on any kind of sustained basis, and we don't have very much guidance as to what the courts would have to do.

It is difficult, at least for me, to comprehend how general damages might be computed which are different from the kinds of damages which may be reflected in the ordinary course in terms of individual recovery.

But to the extent that that can be done, and to the extent that we have tools to do it, then that form of the objection certainly would disappear.

Mr. NASH. Would you counsel that the legislature create the right to recover such damages and allow the courts to hear the proof to see whether such damages can be quantified if it makes clear that such recovery is not duplicative of other damages recovered by individuals?

Mr. ENGMAN. On this one issue, I frankly have some skepticism whether we do have the kinds of tools at this point that would permit the courts to do this in any meaningful fashion. I may be wrong. But based upon what I know about this process, my inclination would be to keep it more simplified, at least at the first shot.

Mr. NASH. Of course, if that is the course taken by the legislature, then the tools which may or may not now exist may not be developed.

Mr. ENGMAN. There is no incentive to develop them. I understand that, and that's a fact that this committee has to take into consideration.

I might note that there is a question concerning the whole area in terms of duplication in recovery. I would suggest that further consideration be given to the problem of duplication in recovery with respect to those situations in which some individuals in the class, for whatever reason, opted out. The question is, how do you prevent duplication when you don't have all of this being handled in a single piece of litigation?

I just raise that as another question which again relates to the question of damages to the general economy.

Mr. NASH. With respect to the premerger notification provisions of the bill, you do suggest that it would be appropriate to require a showing by the Government of the probable illegality of the merger before an injunction should issue.

As I understand the state of the present law, that is, the present requirement the Antitrust Division, at least, must meet before consummation of a merger can be enjoined.

And that is the burden, according to Mr. Kauper's testimony, that the Government has been unable to meet in a large number of cases.

As a result, of course, mergers do take place. Divestiture comes eventually after many years. I think it would be helpful for the subcommittee record if you could supply a listing of each of the merger cases brought by the FTC, specifying the date the case commenced, the date a final judgment was entered, whether the Commission was successful or not, and then the date of final divestiture, so we can get a feel for how long the process takes.[1]

Mr. ENGMAN. I would be happy to do that. I might say, Mr. Nash, that particular aspect of the testimony—and here again I am speaking for myself—I think, on reflection, is probably inartfully worded; and upon reading Mr. Kauper's testimony, I cannot say that I really disagree with the points which he makes.

From a personal point of view, the thought that I would attempt to leave with the committee is that there should be some mechansim with respect to this automatic stay which would permit it not to be utilized in certain instances.

And I think a very sound argument can be made for the proposition that the burden ought to be on the other side.

Mr. NASH. In your prepared statement, you indicate that the Commission's premerger notification program commences at a $250 million figure for the acquiring company, and you do express concern about the lower figure in S. 1284 of $100 million.

How does the Commission presently learn of mergers or acquisitions by companies having sales or assets in a lesser amount than $250 million?

Mr. ENGMAN. Well, we learn it from the same general sources that I guess everyone else learns them in terms of trade publications and the like.

I might indicate in this connection that our staff did run a study on what would be the effect of reducing the limits to $150 million—this is not the $100 million that's in the legislation—and discovered that it would have picked up three more economically significant mergers, that is, those concerning which legal action might have been warranted.

Mr. NASH. Three out of how many filings that would have been generated?

Mr. ENGMAN. In this instance, I think that the number was in the neighborhood of 20 or so. The staff's estimate is that by lowering the limit to $100 million and $10 million—we are talking about perhaps as many as 500 or 600 additional premerger notifications in a year compared with a base of roughly 150 companies right now under our $250 million limits.

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[1] See p. 983.

Mr. NASH. And if the limit were $150 million as you originally stated, do I understand that another 20 mergers would have been picked up, three of which would have been economically significant?

Mr. ENGMAN. Well, I think the number is 15 as I look at my notes here. I emphasize that this was a 9-month period, and it is a very difficult kind of thing to get a meaningful answer to without looking at it for some period of time, because we see increases and decreases in merger activity.

Obviously right now they are relatively low. I think the best thing to do is for our staff to prepare more detailed estimates and provide them for the record.[1]

Mr. NASH. With respect to title VI, nolo contendere, your testimony states that the Commission defers to the views of the Department of Justice.

In 1966, then Chairman Paul Rand Dixon testified before the subcommittee in support of the nolo provision stating he was strongly persuaded that the way to stop antitrust violations was to make them unprofitable.

And he went further and suggested that the bill be amended to make an antitrust cease and desist order of the FTC admissible as evidence in subsequent treble damage actions based upon the same violations of law as may be found by the Commission.

I think it would be useful for this record to have your views, and the views of the Commission, on the proposal made in 1966 by Chairman Dixon.

Mr. ENGMAN. I would be happy to do that. First cf all, the testimony of then Chairman Dixon, in 1966, was made prior to certain judicial determination.

In 1969 and 1970, I think, there was a determination in the *Purex-Proctor & Gamble* case, holding that a cease and desist order of the FTC adjudging a violation under the Clayton Act is a final judgment, and therefore, could be introduced as prima facie evidence in a private action.

More recently, of course, we have the enactment of the Magnuson-Moss FTC Improvements Act which, in terms of authorizing separate civil penalty suits and consumer redress actions arising from unfair or deceptive acts, covers another aspect of that from all practical points of view.

So we are left now with one segment, that is orders dealing with unfair methods of competition, which still have no value as evidence, and in terms of having an applicability with respect to those orders, I frankly don't know the views of the Commission at this point.

I think we would be willing to consider how all of this meshes in in light of the new legal authority.

Mr. NASH. The last point I would raise relates to Senator Bayh's amendment. His staff called and advised that copies were sent to you shortly before he introduced them and that you might be prepared to comment in a general way.

If not, of course, subsequently the subcommittee will receive your views in writing for the record.

Mr. ENGMAN. Well, I did not really have very much opportunity to study carefully Senator Bayh's suggestions. With respect to his first one, as I read it, he is raising quesions of criminal and fraudulent

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[1] See p. 983.

action, and my initial reaction would be to defer it to the Justice Department which has more expertise with such matters than we do.

With respect to the civil penalties, I might make a couple of observations. I would not necessarily oppose the concept of civil penalties. I think it is conceivable that such a concept could have some value in certain kinds of instances.

I do think if that approach is taken, some consideration has to be given to how these damages and/or penalties pile up on each other.

If we are talking about an effective change in the treble damage approach to something substantially greater than that, that is at least something the committee should think about. But it is something, in my judgment, that is worth thinking about.

Mr. NASH. Thank you, Mr. Chairman. No further questions.

Senator HART. Mr. Chairman, thank you very much, and thank your associates on the Commission.

Mr. ENGMAN. I again want to thank you for your interest in this area and that of your colleagues. The important thing is that we are able to talk and get action on aspects of this bill.

Thank you.

[The prepared statement of Mr. Engman follows. Testimony resumes on p. 73.]

Prepared Statement of Lewis A. Engman, Chairman, Federal Trade Commission

Thank you for inviting me here today to present the views of the Commission on S. 1284, the Antitrust Improvements Act of 1975.

At the outset, I want to express my support for your efforts, Mr. Chairman, in proposing this bill. While I will want to make some comments about particular provisions and to raise some questions about certain features that we would like to see included or given further consideration, I think we should all recognize that this legislation is very important to the enforcement of the antitrust laws.

I have made no secret of the fact that I believe competition, maintained by antitrust enforcement, to be the best long-run solution to many of our economic problems. I should add, however, that unless our antitrust processes are improved, they cannot do the job.

We have moved in that direction at the FTC in recent years by focusing the resources available to us on those areas of the economy most in need of antitrust attention—areas such as energy, food, and health care. Big cases demand concentrated allocations of resources, and we have begun to allot them according to that principle. At the same time, we are attempting greatly to increase our impact in the antitrust area by developing enforcement programs that can be implemented by our regional offices. The purpose of this is to ensure that our antitrust presence is felt at every level of the business community.

The purpose of antitrust is not to shackle the economy with regulatory-type controls. On the contrary, a vigorous antitrust policy should obviate the need for most such controls by ensuring the presence of that cheapest and most effective of all forms of regulation, the free and competitive marketplace. Antitrust enforcement does this as much by the practices it deters as by the practices it prosecutes. Although that deterrent effect is difficult to measure, it is extremely important. We can assure ourselves in a number of ways that it is achieved: We can bring well-focused cases that drive home the lessons of the law, we can conduct investigations that are sharply and swiftly focused where the greatest problems lie; and we can develop sanctions and remedies which make it clear to third parties that violations of law and resistance to justified investigative demands are a costly matter. I believe that the legislation before us will strengthen our antitrust enforcement in these regards; that it will provide our program with the quality of deterrent necessary for the preservation of our competitive economy.

Let me now touch upon the major provisions of the bill and describe our position with respect to each of them.

The first substantive provisions of the bill, contained in title II, would make substantial changes in the Antitrust Civil Process Act of September 19, 1962, 15 U.S.C. 1311. These provisions apply to the Civil Investigative Demand procedures administered by the Antitrust Division of the Department of Justice. We support this effort to strengthen the Antitrust Division's hand but think we should defer to them as to the details of the proposal.

I would, however, like to suggest an amendment. The title as drafted does not authorize access by the Federal Trade Commission or its staff to documentary or other materials produced in response to the Antitrust Division's civil processes.

It is now, and always has been, the policy of the Federal Trade Commission and the Antitrust Division, wherever appropriate, to grant each other access on a confidential basis to data and information secured during investigation or trial of a civil matter. This is a daily occurrence. Information secured by the Department through its grand jury investigations, of course, is not available to the Commission for examination. But I think it is desirable to afford mutual access to each agency's civil investigative material where practicable. In the antitrust field, the Commission and the Antitrust Division, in many instances, have concurrent jurisdiction. Through long-established liaision arrangements, great effort is made to keep from duplicating each other's work. To permit or require duplication of effort because one agency is barred from access to information obtained by the other would be burdensome, both on the machinery of enforcement and on members of the business community who have to comply with compulsory process.

The proposal in S. 1284 probably would result in most of the Antitrust Division's civil investigation being conducted under the compulsory process that is provided. We think that the FTC staff should be permitted the same access to information produced in response to a Civil Investigative Demand as it now has to information that is not developed under Civil Investigative Demand process. Accordingly, I suggest that serious consideration be given to providing for full exchanges of information with respect to civil investigations for the benefit of both the agencies and the public.

The provisions in Title III of the proposed bill also are very important to the Commission because they would significantly expand the scope and effectiveness of the Commission's compulsory process.

First, they would bring enforcement provisions with respect to our investigative subpoenas into parallel with our authority to obtain Special Reports under Section 6(b) of our Act. At present, the Commission has no sanctions for non-compliance with our subpoenas.

Next, the penalties for non-compliance with both subpoenas and requests for special reports will be increased from the current $100 per day to a minimum of $1,000 and a maximum of $5,000 per day. The penalties will begin to accrue 15 days—rather than the present 30 days—after service of notice of default.

The proposal also would prohibit court challenges to Commission compulsory process prior to the service of formal notice of default; and would limit the circumstances under which stays of the accumulation of civil penalties would be permitted pending court decisions on enforcement of the Commission's compulsory process.

The Commission has long been troubled by delay in enforcing its compulsory process. We want to eliminate that delay as much as possible and have been steadily improving our own procedures to eliminate the part of the delay which is within the control of the Commission.

Nevertheless, we are frequently faced with long court battles to obtain enforcement. Parties under investigation have little to lose by resisting subpoenas because all that happens in the end is that they have to produce documents and answer our questions. No sanctions are imposed on them. Under the proposal, the Commission will still have to justify the use of compulsory process to the courts, but respondents will have a disincentive to delay because the Commission can start penalties running by serving a notice of default. The respondent will have to convince the court that there is real merit to their opposition in order to stay the accumulation of penalties. We think that is not only fair but will help to eliminate frequent and aggravating refusals to comply with compulsory process.

The next section of the bill, Title IV, deals with the subject of *parens patriae.* A great deal has been said on this subject and substantial testimony given. Spokesmen from the Antitrust Division and the Commission's staff have generally supported the idea that the states' attorneys general should be permitted to recover antitrust damages in behalf of, and for the benefit of, citizens of the States. I also support the principle that aggrieved citizens who suffer damage as a result of antitrust violations should not be denied relief in a practical sense because the individual harm suffered by each citizen is too small. Thus I generally support the *parens patriae* concept. Where citizens have been injured, but are not capable of obtaining adequate relief for themselves—for lack of adequate financial resources or lack of legal standing—the states should be able to act in their behalf.

A number of questions, however, have been raised concerning the specifics of proposed *parens patriae* legislation. First there is the question of how the filing of a *parens patriae* suit affects the rights of injured citizens to bring individual actions. In the present bill, a state attorney general filing an action to recover damages sustained by the residents of the state would be required to have notice of the suit published. Any person affected would have the opportunity to exclude his particular claim from the *parens patriae* action by filing a notice with the court within 30 days. Failure to file such a notice would bind individual recovery to the final determination of the state attorney general's action. There is a question, however, whether such notice by publication would be fair or satisfy the requirements of due process—especially with regard to individuals who do not actually see or read the published notice. The Committee should also consider whether the time allowed for filing a notice of exclusion is unreasonably short—90 days would appear more desirable.

A second question concerns the possibility of duplicate recovery against the same defendant. S. 1284 would allow a state attorney general to sue both for damages sustained by the residents of the state and damages to the general economy of the state or any political subdivision thereof. The bill does provide

that such "general economy" damages shall not be duplicative of the damages suffered by the state's citizens—but the question can be raised whether the two can realistically be separated. The concept of "general economy" damages under the proposed legislation would not foreclose individual actions by residents of the state.

A related question concerns how "general economy" damages are to be computed. Some have raised the question of whether the econometric tools exist for valid calculation of damages to the "general economy" of a state resulting from a particular antitrust violation. A hypothetical case may suggest some of the difficulties. Suppose that several firms have overcharged the citizens of a state for certain goods by means of an illegal price fix. The direct damages to the consumers could be recovered either by a private suit or by a *parens patriae* action under Section 4(C)(a)(1) of this bill. But what additional damages are recoverable under Section 4(C)(a)(2) for injury to the general economy? To answer this question, it is necessary to determine how overall economic activity has been affected by the fact that the overcharge has transferred a degree of buying power from the consumers to the selling firms. Can that effect be reasonably quantified? Presumably, the overcharge will have influenced the allocation of economic resources, but again, is that effect measurable? I suggest that the Committee may want to consider the question of whether Section 4(C)(a)(2) might prove ineffective because general economy damages might not be susceptible to meaningful proof.

A final question relates to the basis for proof of damages listed in Section 4(C)(a)(1), particularly the concept of "excess profits." Again the question is whether econometric tools exist to make reliable calculations of the "pro rata allocation" of excess profits attributable to an antitrust violation occurring within a particular state, especially where the violation affects more than one state.

Title V of the proposed bill deals with pre-merger notification. It would require a waiting period before consummation in the case of mergers meeting certain sales and asset size criteria.

Before discussing some of the specific provisions of this proposal, I would like to identify what we consider to be the real problem in merger law enforcement. As matters now stand, we have a pre-merger notification program of our own which has been in effect since 1969. Our program requires notification and the filing of special reports. The Commission has recognized from the outset of its own program, however, that it could not require a waiting period before consummation of the merger during which it would receive and evaluate the information requested. Sometimes it takes quite a long time to get that information. This is the real problem. We may get too little information too late.

Of course, we now have authority to go into court and seeka preliminary injunction, and we can use this authority in merger cases. We have already demonstrated in one case that, if we can get information to support our position, we can go to court and obtain an order that ensures that there will be a divestible entity if we ultimately prevail. The court can even enjoin the merger entirely in an appropriate case. What we really need in addition to this, by way of legislation, is a means to ensure that we will get the infomration needed to accomplish these actions before it is too late. The 60-day waiting period will permit us, under compulsory process if necessary, to obtain information and to seek appropriate relief.

Beyond this, I would like to raise some questions as to the approach that the proposed legislatiou would take.

I think we all recognize that there may be instances in which mergers are economically desirable. The merger law quite properly puts the burden on the government to challenge by court or administrative proceedings those mergers which appear to threaten comptition. If we can get the information that we need to make the determination as to whether a particular merger should be opposed, we think the burden should be on us to make the challenge. Rather than mandating a court, upon application of the enforcement agency, to enter an order prohibiting consummation of a merger pending final judgment, the law should permit a court to require a showing by the government of probable illegality. Also, the court should have the discretion to permit mergers to take place upon adequate showing that the acquiring company would remain a sufficiently distinct entity to permit ready divestiture if later ordered.

I am also concerned that the proposal might get the Commission and the Antitrust Division into the business of controlling mergers rather than maintaining what I think is their proper role to enforce the antitrust laws. If we had to conduct full investigation of all mergers exceeding the $100 million assets or sales test that

is contained in the bill, the fruits of our efforts might not be worth the cost. Our own pre-merger notification program sets higher limits of $250 million of assets or sales and appears to be satisfactory for purposes of getting basic information on large mergers. I question whether such rigorous treatment of smaller mergers under the proposed bill is really necessary or wise.

I am similarly concerned about the requirement that any acquiring company regardless of its size or the size of the acquired company, must file a notification report 30 days prior to merger. Although the bill permits the Commission to recognize exemptions, it may not be necessary or desirable to evaluate all such reports. It should be noted that the Commission currently has authority to require any pre-merger reports it deems necessary, regardless of company size. Also, as presently drafted, the bill appears to require notification of mortgages or other secured interests. I do not think such a broad reach is necessary to achieve the purposes of the pre-merger notification.

Finally, I am concerned about the last provision in the pre-merger notification section of the proposed law. That provision would, in any Section 7 proceeding, permit the Commission or the Antitrust Division to apply to a court to enter an order establishing the purchase price of acquired stock or assets, and requiring that the property be maintained as a separate entity and that the proceeds accruing to the acquired property be placed in escrow pending the outcome of a proceeding on the merits. Upon entry of a final order finding a violation, the court would be required to order divestiture at a price not exceeding the purchase price and to see to it that the proceeds in the escrow account be divested along with the acquired property.

I seriously question whether these provisions are workable and suggest that they may be even counter productive. They limit the freedom of the enforcement agencies and the courts to design flexible relief and also put them in the business of doing such things as setting prices and determining accounting methods for measuring profits. The substantial questions raised by this approach would be unnecessary if the enforcement agencies had sufficient information at the pre-merger stage to be able to ask the court to provide the right kind of relief for the particular circumstances.

To mandate divestiture in all instances, and particularly to predetermine the price at which divestiture will occur, seems too rigid. We always try to tailor our relief so that the competitive conditions which prevailed before the merger are restored. But this may not be simply a matter of requiring divestitute of the acquired property. Our experience shows that some cases may require tailoring the divestiture, or other remedy, to the economic conditions prevailing at the time. I can point to one example of this in the settlement several years ago of the *Georgia-Pacific* case which resulted in the creation of an entirely new, major company from approximately 20 percent of the assets of Georgia-Pacific.

The next title of the bill, Title VI, would provide that *nolo contendere* pleas in criminal antitrust cases be given *prima facie* effect in subsequent private actions. Since these provisions are limited to the Antitrust Division's prosecution of criminal cases, as to which we do not have expertise, we defer to the Justice Department as to the need for these changes.

As to the final section of the bill, Title VII, we endorse the extension of Clayton Act jurisdiction to matters "affecting commerce," as well as those "in commerce." This provision is consistent with recent legislation making a similar change as to our jurisdiction under Section 5 of the FTC Act. Also, we suggest that Section 7 of the Clayton Act, which currently applies only to mergers between "corporations," be amended to apply to anticompetitive mergers between "persons, partnerships, and coprorations." This would bring the Clayton Act into conformitv with Section 5 of the FTC Act as well.

Finally, Section 703, "Foreign Actions," might encourage courts to enter judgments against foreign parties who are unable to comply with discovery requests in antitrust cases by reason of foreign law. This could be subject to substantial abuse by competitors of foreign entities. Such a result could be detrimental to competition. Accordingly, the Commission suggests that this section be deleted or, in the alternative, the section's applicability be limited to actions brought by the Government in order to eliminate the possibility of its abuse by private litigants. If this course is followed, the section should be further expanded to include administrative proceedings under the Federal Trade Commission Act as well as proceedings before the federal courts, since it would be anomalous for different rules to prevail as between cases brought by the Department of Justice and by the Commission.

Mr. Chairman, I want to thank you and the Members of the Committee, for the opportunity to express our views on these important changes in the antitrust law and to offer the continued assistance of the Commission and its staff in this important work.

Senator HART. The next witness is a colleague who, though not on this committee, has evidenced a very strong interest in strengthening the antitrust laws of this country. He has assumed burdens that go beyond the call of duty, and we welcome him.

Senator Haskell of Colorado.

STATEMENT OF HON. FLOYD K. HASKELL, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator HASKELL. Thank you very much, Mr. Chairman. I apologize for being late. My calendar said 10 o'clock.

Mr. Chairman, I have a statement that I'd like to submit for the record,[1] if I may, and I would like to just comment briefly.

First I would like to congratulate you and Senator Scott for introducing S. 1284.

It's basically my view, based upon experience in private law practice, my short tenure in the Senate, and hearings that I have held as chairman of the Ad Hoc Subcommittee on Integrated Oil Operations of the Interior Committee, that basically, unless we take steps to reintroduce competition in the major industrial sectors of this country we are headed for Government regulation of major industries which I personally would consider a disaster.

I know there are persons far more expert than I who have and will testify before you on this general subject, but it is a matter of uncontested fact that we have ever-increasing concentration in the major industrial sector.

It is also a matter of fact that I believe is indisputable that the abilities of private counsel representing companies in normal litigation can stretch out the litigation to a point where any antitrust measure ultimately ordered and sustained by a court is basically too little and too late.

The resources available as a matter of legal expertise, economic expertise and otherwise, are heavily weighted in favor of the company that is being challenged.

In passing, I would like to mention what I think is probably the best example that I have seen in recent years of the administrative price system at work. As you will recall, in the fall of last year, in the face of falling demand, the automobile companies raised their prices $400 to $500.

An analysis I read made by an investment banking house indicated that the new price increased the net on each automobile somewhere between $150 and $200. To me that represents possibly the most dramatic example of the free enterprise system not working, because normally in the face of falling demand, you don't increase your price and increase your net per unit of operation.

Having said that, however, I'd like to turn to your title V of S. 1284 which is the premerger notification provision. As you are aware, Mr. Chairman, as a result of certain case studies on the Subcommittee on Integrated Oil Operations, I arrived at a conclusion similar to

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[1] See p. 76.

yours, that we must have something that says, "Stop. Let's take a look," before a merger takes place.

This is necessary for many reasons and these are set forth in my prepared statement. Both the Antitrust Division of the Justice Department and the FTC, speaking through its Chief of the Bureau of Competition admitted that, assuming the private companies do not cooperate, you cannot prevent a merger.

And of course, once you have a merger, then divestiture is a theoretical possibility, but it is not more than theoretical, because new contracts are entered into, new arrangements made, new financing is made, shifts in functions of units take place and divestiture becomes just an empty thought. It is recognized as such by most courts because there are very few cases where the Justice Department has been successful in securing an order of divestiture.

For these reasons I would like to heartily support title V of the bill that I intend to introduce which is very similar to yours. Let me discuss briefly the two case histories that came before the Subcommittee on Integrated Oil Operations.

One was a merger which took place between Burmah Oil Co., a British based company, and Signal Oil and Gas which was based in California. Apparently on Christmas Eve, according to the testimony, counsel for Burmah called the Justice Department and said they were going to merge.

The Justice Department said please wait and let's look into it. The counsel for Burmah and Signal said, "Sorry, gentlemen, but I'm not going to do so," and the merger was consummated on January 28 or a little over 30 days later.

I think this shows the lack of enforcement tools of the Justice Department.

The other case history was a situation where Standard of Indiana announced that it was going to take over Occidental Petroleum in a tender operation. In that particular instance Occidental Petroleum was not really all that interested in being taken over and for that reason fed to the FTC information and Standard of Indiana felt it had to cooperate.

Now, Standard of Indiana ultimately backed off. Information which will be shortly produced as a report of the subcommittee will indicate that they backed off basically because they knew that they were going to have a long, hard road of litigation ahead. Occidental would not go along with the proposition, and therefore, they would not be able to get the eggs together in one basket, scramble them, and then wait for later on.

And in that particular instance, the Chief of the Bureau of Competition of the FTC, in response to a letter from me, indicated that if the parties to an action, did not cooperate they would not be able to effectively stay the merger while they investigated.

If we are going to prevent ever-increasing anticompetitive mergers in this country, we have got to have a procedure whereby the Government, either through the Antitrust Division, as you do it, or through the FTC as I would prefer to do it, has an opportunity to review the situation. A hearing can take place, if necessary, and a stay order be issued if that is the will of the Commission or the Antitrust Division and subsequently litigation can take place.

Mr. Chairman, that really completes all I had today on the subject. I would appreciate if my statement could be received and I'd be glad to try and answer any questions.

Senator HART. Thank you, the statement will be printed in the record.[1] I have had a chance to read it. It is an excellent statement.

The bill which you intended to introduce and which you attached to that statement provides a waiting period of 180 days, and the bill that Senator Scott and I have introduced has a waiting period of 60 days.

I know that there isn't any crystal ball that gives us a guarantee of the most appropriate period. I react this way to your 180 days, although conceding that 60 days may be too short.

We want to avoid needlessly tying up an enterprise which will not find itself in antitrust trouble, and yet we do want to come up with a period sufficient to permit reaction if the Department or the Commission finds that the facts warrant it.

Do you have any strong feeling about 60 days or 180 days?

Senator HASKELL. No, Mr. Chairman, it is a question of judgment and balancing. It is balancing the desire not to prevent the business transactions which are legitimate from taking place allowing a sufficient length of time for the regulatory agency or the Antitrust Division, to really take a look at it.

And it is a matter of availability of personnel within those agencies and whether you have the cooperation of the companies.

Now, I must say I have picked 180 days out of the air, balancing those two things. I presume that you picked 60 days out of the air, balancing those two things, and I do not know what the right time period is.

Senator HART. For clarification of the record, effective antitrust enforcement would require that the opportunity presently in section 7—allowing the Government to challenge mergers even well after they have taken place and to seek divestiture—be retained.

Am I correct in reading your proposed bill as not preventing Government or private citizens from challenging a merger under section 7, even though the action was filed later than the 180-day waiting period?

Senator HASKELL. You are correct, Mr. Chairman. The only thing that my bill would ban would be this fact situation: Assuming accurate facts were submitted, and assuming there were no omissions of material facts, then criminal prosecution against the officers of the corporation would be banned.

In other words, if they had made a full and complete disclosure and they had gotten a favorable rule from the FTC, I felt they should be shielded from criminal prosecution.

This would not, however, prevent a private action. It would not, however, prevent a subsequent Government action on a civil basis seeking divestiture, or any other remedy.

Senator HART. That is the only immunization that is contained?

Senator HASKELL. That is the only immunization that my bill intends. Now, if the drafting is incorrect, I would be delighted to change it, but that is the basic intent.

Senator HART. Senator, thank you very much.

Senator HASKELL. Thank you very much, Mr. Chairman.

[The prepared statement of Senator Haskell follows. Testimony resumes on p. 78.]

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[1] See p. 76.

PREPARED STATEMENT OF FLOYD K. HASKELL, A U.S. SENATOR FROM THE STATE OF COLORADO

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear before your Subcommittee while testimony is being taken on S. 1284, introduced by the distinguished Subcommittee Chairman (Mr. Hart) and cosponsored by the Minority Leader (Mr. Scott).

Let me state at the outset that I am a supporter of the legislation. I am impressed with its thoughtfulness and am looking forward to this Subcommittee's action on the measure.

I would like to take this opportunity to discuss the philosophy of and need for "Title V—Premerger Notification" in some detail. I have been preparing legislation which I hope to introduce shortly which is very similar to Title V. My bill, a copy of which is attached to my testimony, differs from the substance of the provisions of S. 1284 in only two respects. I would give the Federal Trade Commission the sole authority to conduct the pre-merger study. I would also allow 180 days for such a study instead of the 60 days provided in S. 1284.

The pre-merger review, whether conducted by the Justice Department or the FTC, would give us an opportunity to examine whether the planned agglomeration of the would-be mergers is in the best interest of this nation or whether the merger would be anti-competitive and would be likely to violate sections of our current antitrust statutes.

It is imperative that such an antitrust review be conducted before the merger or acquisition takes place. If we wait until the merger has occurred and the assets are combined it is much more difficult to unscramble the merged assets. Divestiture investigations and orders typically drag on for years and the damage is done long before the corporate assets are taken apart again.

S. 1284 and my draft legislation set up a simple procedure which provides for a review of the planned merger or acquisition. Those planning to merge or to acquire assets of other corporations are required to give notice of their intentions. The Government then has an opportunity to issue a written ruling that the combination or merger does not appear to violate any of the antitrust laws and a written opinion with respect to the competitive impact of the merger or combination.

The present merger review process simply does not work. The FTC and the Justice Department may not receive any notice of an impending merger or acquisition. As members of this Subcommittee know, the Special Subcommittee on Integrated Oil Operations of the Senate Interior Committee which I chair, recently concluded an investigation of a merger whereby an independent producer of oil and gas was acquired by a major foreign integrated oil company. The acquiring company, Burmah Oil Co., Ltd. informed the Justice Department on Christmas Eve, 1973, of its intention to acquire The Signal Company's oil and gas operations. In spite of repeated Justice Department requests that the acquisition be delayed so there would be sufficient time to review the merger proposal and to take affirmative action to block the merger, the companies went right ahead. The merger was consummated January 28.

Under present law the Government does, of course, have the power to go to court to seek a temporary restraining order to halt a proposed merger. However, the Federal Rules of Civil Procedure then require the Government to make a showing of reasonable probability of ultimately succeeding in the case within 10 days.

Thus, according to the Justice Department's own account, they were apparently snared in a classic "Catch 22" situation: they needed more factual information; they had no opportunity to obtain the necessary information to make the necessary showing in Federal court that they were likely to prevail on the merits; Burmah and Signal refused their requests for time. The details of the merger are set forth in a Subcommittee publication issued last fall.

An equally eloquent example of the need to improve our merger review procedures came before my Subcommittee again in December, 1974. Standard Oil Company of Indiana was actively pursuing the acquisition of Occidental Petroleum Corporation. Once again the Government's ability to investigate the merger was dependent upon the willingness of the companies to cooperate.

Both Standard of Indiana and Occidental seemed willing to cooperate with the FTC investigation and to provide necessary information. The investigation eventually became moot, however, when Standard of Indiana abandoned its acquisition plans.

Following the Subcommittee hearing on the merger, I wrote a letter dated December 27, 1974 to the FTC Bureau of Competition posing this hypothetical situation:

"Assume that a very complex merger is proposed and that the legality of the merger cannot be evaluated without a substantial amount of data which is not available from public sources. Also, assume that both firms are eager for the merger and are unwilling to provide any voluntary assistance to the FTC's investigation. If these firms move quickly to consummate the merger, what are the chances of the FTC being able to stop it? Can the Commission's compulsory process powers be used quickly enough to get the required information for an injunction if the firms are determined to resist?"

Mr. James T. Halverson, Director of the Bureau of Competition, replied on January 14, 1975:

"Under the fact situation you have posed, it is doubtful that either the FTC or, for that matter, the Department of Justice would be able to obtain quickly from the companies information needed to evaluate the merger or to take action to stop its consummation unless the agency already had in its possession enough information to prosecute the case."

Mr. Halverson continued:

". . . under circumstances such as those which occurred in the Burmah matter, and which are similar in many respects to the hypothetical fact situation you have presented to me, there is still no guarantee of timely enforcement action if cooperation of the parties under process is not forthcoming."

I do not believe that we can afford to allow the oversight of mergers rest upon the cooperation of those planning to merge. It is not sound public policy to do so and stronger enforcement powers are needed.

Mr. Chairman, I could go on at great length about the need to protect competition in this Nation. However, the members of this Subcommittee are well aware of the disturbing trend toward concentration in many of our most basic industries and I need not reiterate the dismal statistics here. Let it suffice to say that I feel the provisions of Title V are extremely important and will give the Justice Department and the Federal Trade Commission the resources necessary to help stem that trend.

I am tempted to comment at some length about the other titles of S. 1284 but I shall resist the urge. The Subcommittee has scheduled a number of very expert witnesses to testify and I join with you in looking forward to learning their views.

Thank you.

[S. —, 94th Cong., 1st sess.]

A BILL To require the opinion of the Federal Trade Commission with respect to the legality and competitive effect of certain mergers

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Premerger Notification Requirements Act".

SEC. 2. (a) A business enterprise engaged in or affecting interstate commerce may not combine or merge through acquicition or otherwise, with any other person if the total assets of the combination or merger exceed $100,000,000 or if the asset to be acquired is in excess of $10,000,000, unless the Federal Trade Commission—

(1) has issued to such business enterprise a written ruling that the combination or merger does not appear to violate any of the antitrust laws and a written opinion with respect to the competitive impact of the merger or combination; or

(2) upon notice of intent to combine or merge, filed, in accordance with the requirements of subsection (b) of this section, not later than 180 days prior to the combination or merger, has failed to issue the ruling and opinion required to be issued under paragraph (1) of this section and has failed to institute a civil proceeding to prevent such combination or merger.

(b) The notification required by subsection (a) of this section shall be in such form and contain such information and material as the Commission shall by regulation prescribe.

SEC. 3. The Federal Trade Commission shall not issue any ruling or opinion required under paragraph (1) of section (2) of this Act unless a statement of intent to combine or merge has been filed with the Commission by the business enterprise proposing to combine or merge at least 180 days prior to the combination or merger.

SEC. 4. (a) Any ruling issued under the provisions of this Act shall not affect the authority of the Attorney General or the Federal Trade Commission to litigate on behalf of the United States any anticompetitive or otherwise unlawful practice or combination.

(b) A business enterprise that meets the requirements of this Act in connection with any merger subject to the provisions of this Act shall not be subject to criminal liability which would otherwise arise as a result of such merger if all relevant matters relating to such merger were disclosed to the Federal Trade Commission during the course of the proceedings required under the provisions of this Act.

SEC. 5. As used in this Act the term "antitrust law" includes—

(1) each provision of law defined as one of the antitrust laws by the first section of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 19[illegible] (15 U.S.C. 12), as amended, commonly known as the Clayton Act;

(2) the Federal Trade Commission Act, as amended (15 U.S.C. 41 et seq.);

(3) section 3 of the Act entitled "An Act to amend section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), and for other purposes", approved June 19, 1936 (15 U.S.C. 13a), commonly known as the Robinson-Patman Act; and

(4) any statute hereafter enacted by the Congress which prohibits, or makes available to the United States in any court or antitrust agency of the United States any civil remedy with respect to, (A) any restaint upon or monopolization of interstate or foreign trade or commerce, or (B) any unfair trade practice in or affecting such commerce.

Senator HART. The committee welcomes the Assistant Attorney General, Antitrust Division, the Honorable Thomas E. Kauper.

I should indicate that I spent last weekend, all of it, in Ann Arbor, but not in preparation of this hearing.

STATEMENT OF THOMAS E. KAUPER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. KAUPER. I guess I should indicate I spent it here, Mr. Chairman, in large part in preparation for this hearing. [Laughter.]

Let me first indicate for the record that I am accompanied today by my Special Assistant, Joe Sims, and our Deputy Director of Operations, William Swope.

Let me also apologize, although I see Mr. Chumbris has left, for our failure to comply with the 48-hour rule. I think, as you recognized, Mr. Chairman, this is very complicated legislation.

We have what can only be characterized as an extremely lengthy statement which took a good deal of work, and I hope that it will be understood we are prepared to come back for questioning at any time that anyone desires.

Senator HART. Let me, as this point, acknowledge that I have not had opportunity to read this statement, but the staff director, and I am sure he reflects the feeling of those upon the committee staff who have had the opportunity, whispered to me as you came up, the statement which the Department has filed is incredibly constructive. It is a superb statement.

I think that is the first time I have had anybody nudge me to say that about anybody's statement. [Laughter.]

Mr. KAUPER. Well, thank you, Mr. Chairman, and let me, if I might, just publicly thank these two individuals, who did a good part of the work on this statement.

I think, Mr. Chairman, if I were to read this statement, we would be here for quite some period of time, and I think what I would prefer to do is simply offer the statement for insertion in the record and for study by the committee.

I would like to very briefly, if I might, simply summarize a few of the high points in the testimony, so that it is understood what our basic position on some of these provisions are.

Senator HART. The statement will be printed in full.[1]

Mr. KAUPER. S. 1284 covers a wide variety of antitrust areas, and because of that, necessarily raises a number of issues for discussion.

Title II, which we generally support, would amend the Antitrust Civil Process Act to give the Department of Justice truly effective precomplaint civil investigatory powers.

Title III, on which we will defer to the FTC, would amend the Federal Trade Commission Act to provide increased penalties for not obeying FTC orders or subpenas.

Title IV, which we also generally support, would provide increased parens patriae authority to State attorneys general on behalf of the citizens of their States.

Title V provides premerger notification procedures, and an automatic injunction against the consummation of mergers or acquisitions if challenged by Federal enforcement agencies. With certain amendments, we support the bulk of title V.

Title VI would grant prima facie effect in private damage actions to pleas of nolo contendere in criminal antitrust actions. Because of its adverse effect our enforcement program outweighs, in our judgment, any public benefits, the Department opposes this title of S. 1284.

Title VII contains a number of miscellaneous provisions, including one which would clarify the scope of the Clayton Act which we support with slight modification.

Let me, if I might, Mr. Chairman, just highlight a few particular issues which it seems to me are perhaps the major problem areas.

So far as title II is concerned, the amendments to amend the Civil Process Act, we have, as you know, submitted an administration bill, which is subject to hearings in the House tomorrow, and which, as I understand it, has now been introduced in the Senate as well.

We have, in preparing our testimony for this particular committee on S. 1284, reviewed the administration bill, in light both of provisions in S. 1284 and in light of some comments we have received from members of the antitrust bar and other interested parties.

As a result, we believe that there are some amendments which are probably desirable in the administration bill. Some of those are items covered in S. 1284.

We have attached an appendix to our testimony, which goes through what we believe to be the most appropriate changes, and I don't want to spend time this morning detailing those; the staff has them, and we will probably have further discussions with the staff as this proceeds along.

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[1] See p. 90.

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So let me, if I might, leave that, other than with the generalized statement that we continue to believe, as we have now for some time, that enactment of legislation along the lines of title II is extremely important to our enforcement program, and we view it probably as our top legislative priority item, with perhaps the single exception of repeal of the fair trade exception to the Sherman Act.

Title III, as I have indicated, we will defer to the Commission on, and that brings me to title IV.

Title IV is the parens patriae provision, which differs in some respects from the bill upon which I testified in the House last year.

In general, we support the basic conception of authorization to State attorneys general to represent, on a parens patriae basis, the claims of their citizens under the antitrust laws.

I think we are faced with a series of alternatives, but as a practical matter, so far as claims of individual consumers are concerned, the alternatives are probably either rule 23 actions, or no actions at all.

And thus, we believe that insofar as the bill would authorize the State attorneys general to file on behalf of individual consumers, it is desirable, both in terms of recognizing their interests, and for the additional deterrent effect which it would bring about.

We continue, however, to be very skeptical about the provision permitting recovery of damages to the general economy. I perceive that provision as making a very fundamental change in the nature of damage actions under the Clayton Act. As a practical matter, it creates a damage recovery which is unrelated, on its face at least, to the amount of profit or gain which the corporation itself may have obtained from the violation.

That, it seems to me, is essentially converting section 4 to a much more generalized kind of court action. I have a concern about the amount of damages which might be awarded under that sort of a provision, and hence, at the present time at least, we are opposed to that particular provision of title IV.

There are still additional problems with title IV which we have raised in our testimony, including a rather difficult set of problems that governs the relationship between title IV actions and other actions which might be brought by individuals within the State, either individually or under rule 23.

The present bill, S. 1284, tries to deal with that through an opt-out procedure which may, in some respects, be adequate, and I am not addressing that issue so much.

But I think that the problem is further complicated by the inclusion, as I understand S. 1284, of corporate claims within the area of representation by the State attorney general.

That would mean, as I understand it, that a State attorney general would be representing all of those claims simultaneously.

It would pose problems as to how one breaks down those claims for final presentation between, let us suppose, the wholesaler who is overcharged; the retailer who is overcharged; and ultimately, the consumer.

I suppose what it does, is bring all the passing-on questions into one category which is to be resolved within the total recovery.

I think it does, however, also pose some problems under the opt-out procedure, because in the case of many corporations, it would not be totally clear whether, one, they in fact reside in the State and are

thus in the action; two, it may not be at all clear what part of their claim may be governed by a State boundary and the allocation problems pose some rather difficult issues.

I think the greatest need for this legislation is in the area of consumer claims. And hence, I have serious question as to whether corporate claims really ought to be included at all.

I think it will both complicate the procedure and perhaps carry things a bit further than we really need at the present time.

Now, those are the major items which are covered. There are some other matters raised in the statement, but, with one further exception, those are the only issues I will discuss at this point.

The exception is section 4D, which is the provision authorizing suit by the Attorney General of the United States on behalf of State citizens, where the State attorney general has not filed suit.

This carries the concept of representation of those claims still one step further up the governmental ladder, and I am not altogether sure that it is appropriate for the Attorney General of the United States to be representing consumers in those circumstances.

But quite apart from that, I think it also serves as a disincentive to the State attorneys general, whom, presumably, we are trying to encourage to undertake this sort of activity.

Now, it is true that S. 1284, unlike the bill on which I testified in the House, does not appear to require the Attorney General of the United States to file suit, and in that sense it is less objectionable.

But we continue to believe that the provisions authorizing suit by the U.S. Attorney General are unnecessary and unwise.

Now, with that, let me go on to title V. Title V is a premerger notification procedure, which, as a general concept, we support.

You have already had some discussion of that provision this morning. I think that from our point of view, the important items in this title are not simply a question of whether we receive notice of major mergers.

We do receive notice of a number of major mergers at some point, either through voluntary notification by counsel, in many cases, or simply by reading the Wall Street Journal, or in other ways.

The more significant provision is the waiting period. That is, it is the combination of notification and the waiting period which, it seems to us, is the more critical factor. So we believe this is a desirable provision.

We are concerned, however, with one feature of the bill, which could have the effect of allowing the Department or the Commission virtually unbridled discretion to delay an acquisition.

That is the provision which calls for the extension of the 60-day waiting period, if a demand for additional information has been made during the 60-day period, and we are waiting a response to that demand.

This is a rather cumbersome process, and there is really not much by way of standards as to when that demand should be deemed satisfied.

Now, it is true, the bill provides that the party, if he feels that by the certification by the Assistant Attorney General that he has complied with these demands is unreasonably delayed, can go to court to get a judgment that in fact he has complied.

But I think, Mr. Chairman, that can be a very long process, since, among other things, he presumably would have to wait some time to determine that consent has been unreasonably withheld.

Thus, while we recognize that the 60-day provision in and of itself may be a short time period for some mergers, and that it may, therefore, be desirable to permit an extension to further evaluate additional information which has been sought, we believe that an upper ceiling of some sort ought to be imposed on that time period.

Otherwise, while it is true the party can challenge the request in court, I think, as a practical matter, that is putting a rather heavy burden upon him.

If he wants to accelerate the merger, then he has to, in essence, forego assertion of any legal rights he might have with respect to that demand, and I find that rather troublesome.

In general, however, Mr. Chairman, we do support the concept, and it is in part based on our rather strong feeling, I must say, that divestiture is not an adequate remedy in a good many merger cases.

If we all believed that it was, then, presumably, we could be talking about some kind of postmerger notification procedure or something of that sort.

But as I think I have indicated in my statement, certainly it is my view, and I think the view of the Department as a whole, as well as a good many others, that divestiture simply is not effective for a whole variety of reasons.

The second provision in this title, a substantive provision on which I think I ought to comment briefly this morning, is the so-called automatic stay provison.

The automatic stay, as I understand the way the bill was drafted, is mandatory. If the Justice Department or the Commission files suit within the waiting period, either the original 60-day or the period as it might be extended, the court is directed to issue a stay.

There is no provision for the lifting of that stay, no provision that it is to be issued upon anything other than our certification.

Now, I suppose, like many bureaucrats, it is nice to have power, but I am also a little suspicious of it, and I think that perhaps that goes somewhat too far.

We have suggested that perhaps the most appropriate way to handle this problem is to permit the judge to lift the stay upon a showing of irreparable harm to the firm involved, although we think that showing ought not include loss of profits from the particular transaction, or that the suit is totally devoid of merit or is in some other way arbitrary or capricious.

That, it seems to me, preserves some rights in merging firms, and after all, at this point, it has not been determined that this is an unlawful acquisition.

It seems to us, however, that it ought to be understood, either through the statute or in some other way, that one thing which the judge ought not consider is whether because of the possibility of divestiture, the Government does not need this relief.

That is based simply on our experience with divestiture. I am not even sure it is possible to determine at that point in time that divestiture would be adequate, and based on our experience with divestiture, I think one could almost presume that it would not be, in any event.

There are a number of other questions that arise under the way S. 1284 and this title are drafted that we have raised in the testimony.

One of the most significant of those, and I will simply very briefly point it out, is that while we all talk about this as a premerger notification bill, it in fact extends a great deal further than that, because it covers any acquisition of assets between corporations of the size denominated in the bill.

Now, that can cover an awful lot of things, Mr. Chairman. It can cover acquisition of real estate, office space, acquisitions for investment, acquisitions of various kinds of property simply for normal capital use. It could include patent assignments, which there is still some question as to whether section 7 covers.

It can also cover acquisitions which are clearly within the regulatory jurisdiction of some other agency, and not within our jurisdiction at all.

I think the only point I would make at this point on that issue is that we are prepared to work with the committee in trying to handle some of those problems.

Now, as I understand the committee draft, or S. 1284, it, in essence, leaves those questions for what I gather to be a rulemaking-type procedure by the FTC.

That may be one way in which to try to handle this problem, although it does seem to me that it leaves the business community, a little in the dark as to what it is buying with this particular set of provisions.

And while, as I say in my prepared testimony, I am pretty confident about our judgment along with that of the FTC, I can understand why the business community might not be. I think there are some problems there that we will probably have to work further on and provide some additional views to the committee on.

Let me turn, if I might, then, to one final provision, which is subsection (g).

Subsection (g), in essence, directs the court upon application by the Assistant Attorney General or the FTC to determine the purchase price of the assets which are involved; to set, in essence, a whole separate kind of procedure into place, isolating those fixed assets, to escrow the profits which are involved, and to do that when suit is filed.

I assume from the bill that the profits that are to be escrowed are those accruing after suit is filed, although that is not altogether clear.

Finally, it then directs that divestiture shall be made of all the assets acquired, in the event judgment is entered in favor of the Government.

This provision causes me some real difficulty, and I think the difficulty perhaps arises because we perceive this as a rather severe disincentive to merger activity, which is probably unwarranted.

It is very difficult, I think, for a company to determine how that provision might be applied. It is difficult, frequently, for a company to know with any assurance whether it is going to be sued or not, and I think what this does is to create a disincentive which rests on assumptions about mergers that I don't think are totally valid.

A good many mergers are perfectly lawful transactions. If there was a way to provide the kind of disincentive for those that we know are unlawful, that is one thing. But many mergers serve a number of valid economic purposes, and I am thus reluctant to see what we feel would be a substantial disincentive.

Now, in addition to that, the bill further provides that divestiture of all assets shall be the remedy. That, it seems to me, deprives both the court and the Government of some desirable flexibility in fashioning relief, and thus, we would be rather strongly opposed to a mandatory divestiture requirement.

Let me leave those areas, if I might, and go on. The final set of provisions that I will talk about just very briefly, are the provisions of title VI, which deal with giving an estoppel effect to nolo contendere pleas. This is, obviously, a very controversial subject, and one on which I am sure you will get a wide disparity of views as your hearings go along.

Senator HART. I should explain that on this issue I have talked to myself, over the years, so strongly, so long, that I suffer from a semi-closed mind. [Laughter.]

Mr. KAUPER. I think, Mr. Chairman, in one sense, the real issue which that question presents, is whether or not nolo pleas are to be used as an enforcement device, or to be available to defendants at all. As a practical matter, if the estoppel effect is attached, I think we will not see nolo pleas. And that really is, I think, the ultimate issue which the committee has to deal with.

It is true that in some cases nolo pleas are entered over our objection. But the fact remains that we feel that nolo pleas do, in some circumstances, provide a benefit to us in terms of our resource use.

Now, that is nothing peculiar to nolo pleas in the antitrust area. The only reason it is at all different is the courts have said there is an estoppel effect to guilty pleas. I would suppose we would otherwise see more guilty pleas.

That is, obviously, a rather difficult judgment to make. But I think on balance we do not foresee the significant benefit to private plaintiffs arising from the estoppel effect which some have asserted would be likely to follow from this proposal.

We expect that there is in the law now a great deal of deterrent in any event, with the felony provision, since you are, after all, talking about cases that would be prosecuted as criminal cases to begin with.

And thus, on balance, we do not see enough by way of gain to offset what we think would be a loss to our resource management as well as to, in a sense, the problems of the courts, which have to deal with these cases. Now, one answer to that, I suppose, is to say, as I know you, in essence, are saying, Mr. Chairman, "We will give you more resources." But I am not sure that is really the question.

I think it is a question of whether those resources, and the taxpayer's money, really should be spent in a way which is not necessary to effective antitrust enforcement. So we are, at the present time, opposed to title VI. I recognize, however, that you are going to hear a lot of views back and forth, and a good many to the contrary, I am sure.

I think, Mr. Chairman, in this opening statement I will not comment on title VII. We have submitted comments in the statement. Thank you.

Senator HART. Well, on that last point, and to back off a little from an almost flatfooted position, as you remind me what we are talking about, the actions which have persuaded the Department to proceed criminally; if that is the kind of fellow, or company, that

we are dealing with, it seems to me the doubt should be resolved in favor of assisting, even if only marginally, the sufferer of that kind of criminal conduct. I guess that is the way I understand it.

Mr. KAUPER. Well, I think that is a fair statement of the issue. Our view on this has been—and I must say this comment is probably as applicable to guilty pleas, as to nolo pleas, insofar as you actually gain a benefit to the private litigant—that benefit is really pretty marginal.

This is because all that the damage court has before it is an argument that there is an estoppel based upon the indictment. Now, the provisions of S. 1284 talk, as I recall, to facts that are "necessary to sustain a judgment of conviction". Indictments charge a lot of facts, and someone has to make the judgment as to which facts were "necessary."

Moreover, virtually all of those facts may have to be reproved in order to establish damages in any event. And thus, I am not sure that there is a real gain from giving an estoppel effect to a nolo plea that is at all comparable to that derived from a litigated decree.

Moreover, there is a policy, which it seems to me the Congress, itself has made—and to a degree we are being asked to change—which encourages some form of settlement of cases short of full litigation. Now, again, I suppose the logic of that, in one sense, extends to both guilty pleas and nolo pleas; and the guilty plea issue is basically resolved now in favor of an estoppel effect.

But I think so far as the private plaintiff is concerned, he has available to him now a good deal more than he has had in the past. And I think about all I can do, Mr. Chairman, is simply reflect what is my own judgment, and I think the judgment of a great many people in the Department, that there are circumstances in which this manner of terminating a criminal prosecution is desirable.

Now, I would add one caveat to that. I would hope that there would be full recognition by our judges that for purposes of imposing a sentence, there ought be no difference between a nolo plea and any other kind of a plea. But with that caveat, it seems to me, it is a satisfactory way, in some cases, of terminating criminal prosecutions.

Senator HART. In your prepared statement, you do remind us of the liberalization in pretrial discovery, and motion for production of documents that went into the grand jury, and so on.

Mr. KAUPER. Yes.

Senator HART. The advantages in the more recent past have been developed to help them out. I am sure that part of the feeling that we should try to make the nolo plea one that would have prima facie effect, really reflects the unease people have with the whole business of the nolo plea.

Mr. KAUPER. Well, there is a certain anachronistic quality, it seems to me, to a plea of nolo contendere as a general matter. What has happened in terms of antitrust prosecutions is that there has been a tendency for an emphasis on the nolo plea by virtue of the estoppel effect of other terminations and lack of the estoppel of it here.

But I think you are raising a somewhat different question, which is: If the alternative, which is truly and equally available, is a quality plea, should we have a nolo plea? And it seems to me it may be anachronistic in that sense. But with the disparate treatment of these two, I am not sure that the question before the House is in quite the

same way that it would be as an abstract criminal prosecution matter across the board.

Senator HART. Mr. Kauper, you said that you would be here most of the day, if you read in full your statement. I have been shown a number of questions the staff has prepared, even after the late-arriving presentation. Let me suggest that certain questions be submitted to you in writing,[1] and that when you return for Senator Hruska, and others questioning, that we may have still more questions—some of which are better handled in an oral exchange than they are through correspondence. So, at least, in respect to them, I would turn to the staff members.

Mr. KAUPER. Yes.

Mr. NASH. Your staff advised me, the day before yesterday, that one of the reasons for the late arrival of the statement was the OMB clearance process. With respect to that, has your statement been cleared and approved by OMB; and does it represent the views of the administration?

Mr. KAUPER. Well, I have what I am afraid is a rather complicated answer to that, Mr. Nash. It has been cleared by the Office of Management and Budget as the views of the Department of Justice. Certain parts of the testimony are the views of the administration, namely those which have been stated previously to be the views of the administration. Time simply did not permit circulation of all of the agencies, and thus, I cannot say, today, that these views are, in toto, the views of the administration.

I should add to that, we have no indication of any opposition within the administration. Now, I do not know whether that solves your problem.

Senator HART. No. It does not, but I have not been in a committee where this problem has ever been solved. Your first statement, though, was even more remarkable than others I have heard, if I got it straight. [Laughter.]

Mr. KAUPER. I may not have stated it quite right.

Senator HART. You say that the statement has been cleared by the Office of Management and Budget, as reflecting the views of the Department of Justice. What does that add to, or subtract from? [Laughter.]

Mr. KAUPER. That adds nothing, Mr. Chairman, other than a willingness on the part of the administration to say that we see no problem with permitting the Justice Department to present those views.

Senator HART. Does the OMB take the position it can reject the Department's views?

Mr. KAUPER. I do not think I have ever had it happen to me, so I guess I do not know the answer to that. I think that is not what the process is designed for. The process is designed, in essence, to permit circulation of other departments, to get their inputs. And I think really what that means, as a practical matter, is simply that they have not had time to secure a full clearance. I think it really does not mean much more than that.

I would emphasize that insofar as the comments with respect to title II, the Antitrust Civil Process Act Amendments, which is, with minor exceptions, an administration bill, we do state the views of the

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[1] See letter of July 7, 1975, p. 115.

administration. And I think it is probably fair to say that, in part, with respect to the testimony on parens patriae.

But the time problem and, indeed, the complexity of the testimony, as well as the bill, simply did not permit all of the agencies to really have the kind of time to look at the testimony they should have had.

Mr. NASH. Hopefully, upon your return for further questioning, the process will be completed, and we will know.

With respect to your statement on the parens patriae title of the bill, you make the point that rule 23 is not the optimal vehicle to accomplish for individuals the primary purpose of Clayton Act section 4 damage recovery. However, the subcommittee has received a number of comments opposing enactment of the parens patriae title because of the lack of an actual notice provision.

Assume that the damage action by State attorney generals, as parens patriae, on behalf of persons—is limited to individual consumers who otherwise might not have any redress at all. How do you evaluate the concept of notice by publication in that case, as contrasted with actual notice pursuant to rule 23?

Mr. KAUPER. Well, I think this was something, as you indicated to Mr. Engman, that I addressed to some extent in my earlier testimony. Although, admittedly that was in a somewhat different setting, because those provisions were different in that bill.

I think when one looks at this in terms of notice, and the opt-out sort of requirement, it is conceivable one can come to some different conclusions based on who is included in the class of persons whose claims are involved in the suit. I do not view, in my own judgment, due process as requiring more than the best kind of notice that can reasonably be given.

I do not perceive in dealing with individual consumers, as a due process matter, that it really is possible to give notice on an individualized basis. I just do not perceive how that really can be done.

And hence, it seems to me, the concept of publication may be sufficient in those circumstances. Now, if one begins talking about major corporate claims, I am not sure but what somebody might not come to a different conclusion.

Mr. NASH. That is why I limited the question to a redraft with individual consumers, as you suggested in your testimony.

Mr. KAUPER. Yes. But I think we all recognize that this question of what constitutes sufficient notice, what would satisfy due process—the due process issues after all really arise by virtue of the fact that there would be a bar to assertion of those claims individually—is a question which, I think, almost no matter what is provided in this bill, is going to be litigated in the first set of actions. And I do not think anybody can be totally sure of the outcome.

Those questions are ones that have plagued us in a great many bills for a great long period of time. And I am not much more confident about the results than anybody else, I suppose.

Mr. NASH. In the *Eisen* case, I believe, the court indicated the cost of an actual notice sent to the members of the class to be roughly $300,000. If parens patriae actions by State attorneys general are allowed, pursuant to a rule 23 notice provision, do you have a view as to whether it is likely that many States would undertake that kind of an expenditure before filing such a damage claim?

Mr. KAUPER. I would think it would not be likely that they would do so. I think, when one talks about an action brought by a State, you have a kind of an interesting question. I am not sure anybody really knows the answer but it seems to me that one can view the relationship between the State and its individual citizens, at least, as somewhat different in terms of what kind of notice the State has to give.

But if the State is to be confronted with the necessity for that kind of individual notice, even assuming that it is capable of determining to whom that notice ought to be given, I would find it rather surprising if they were capable of, or willing to make that kind of expenditure. Now, I suppose if what you are talking about is all consumers in the State, maybe they can find some way, if necessary, to put it in anything they mail to all citizens. But above and beyond that, I do not see quite how they would identify to whom you send the notice.

Mr. NASH. A number of individuals raised the question of whether it is constitutionally permissible for the Federal Government to delegate to the States the right to file an action as parens patriae on behalf of citizens for section 4 type damages. Do you have a view on that?

Mr. KAUPER. Before expressing any view on that, as an issue, I think there is a question as to what this bill really does. Now, as we have perceived this bill, what it does is to define what kind of claim can be presented as a matter of Federal law under a Federal statute.

The objections I have seen, as I understand them, go a step beyond that. They are, in essence, saying, this is an authorization to the State attorney general, even in circumstances where State law might not permit him to bring such an action.

Now, it is not clear to me that that is, in fact, what the bill is intended to do. If it is—and you will notice some discussion of this point in my statement in dealing with the third subpart of that provision, which allows the State attorney general to sue on behalf of its political subdivision—I do have some question as to whether, as a matter of Federal law, it is appropriate to confer upon the State attorney general a right to act on behalf of the State to a degree that would override a State law determination that he ought not be permitted to do so.

I think there is a very serious question as to whether that would, in fact, be appropriate. But I have not tended to view this legislation in that light. I have tended to view it as simply a definition of injured party within the concept of the Federal law.

Now, I suppose another way of putting that, and maybe the reason this dilemma arises, is because the bill is explicit in saying it is the State attorney general, as opposed to the State. But I do not see why, for purposes of a Federal definition, that is a major difficulty.

Mr. NASH. Another area you raise a question in relates to whether the State should be permitted to recover damages to its general economy. In fact, I think you oppose that——

Mr. KAUPER. Yes.

Mr. NASH [continuing]. That provision. And as I understand the reasoning, you are concerned about possible duplicative damages;

about whether damages to the State's general economy can be separated and quantified, contrasted with damages to individual consumers; and the possibility of a quantum jump in liability.

Again, as I understand what the States seek to recover, in North Carolina, for example, it sought recovery for a loss in tax revenues because of the antibiotic conspiracy, in *Hawaii*, the State sought to recover for the loss of tourism—and, again, I make no judgment as to whether they can prove and quantify that amount in court—but assuming that is the type of damage they seek recovery for, do you believe that is a separate and distinct damage, or does it overlap the type of damages individual consumers might sue for?

Mr. KAUPER. Well, I think that in almost any of those situations there is going to be an element of overlap. If you look at it in terms of loss of tourism, the most immediate effect, in terms of loss of tourism, for which they will be trying to recover, will be to those very people who are the victim of the conspiracy in the first place. That is the medium through which the loss of tourism, in essence, occurs. And thus, there is a risk of duplicative recovery.

I think above and beyond that, however, as I indicated in trying to more or less paraphrase this statement, I am concerned with turning this sort of action into a much more generalized tort kind of action, where the amount of damages really bears no necessary relationship to the amount of "ill-gotten gain."

Now, that, it seems to me, is a fairly significant change in the whole concept of the treble damage action. We have to assume that it is desirable, indeed, I feel rather strongly it is desirable that the ill-gotten gain be removed.

But beyond that, you are into an area where we would have to concede the law is not always as clear as we would like to see it. And you have the risk of very considerable damage in some of these areas. Let me give you an illustration—although we have suggested that it be made clear that this would not apply to Robinson-Patman, in any event. There are some kinds of acts in which you do not want to provide a massive deterrent where the outcome of litigation is uncertain.

That is, there are some kinds of acts which may be, in a given fact setting, quite procompetitive; in others they might conceivably be anticompetitive. If you continue to increase the damage exposure, you may deter a great deal of procompetitive conduct. I suspect that would certainly be true if you were to put this kind of liability on Robinson-Patman Act violations. You would have still more reason, for example, for a company not to cut its price to particular customers.

Mr. NASH. My last question relates to the premerger notification and stay provisions. You suggest a more balanced test to balance the equities, and you provide some specific standards. What type of irreparable harm do you have in mind when you suggest that standard as one element for not staying a merger?

Mr. KAUPER. Well, I think there are circumstances in which, frequently, by virtue of the condition of the acquired company, there may be strong reason to permit the acquisition to go ahead. This could be true simply because, for example, of the financial condition of the company.

Now, that may be in a case in which there is also going to be presented a failing company defense. In fact, in many cases it might

be just exactly that kind of case. But keeping in mind that there has been no judgment by the court as to whether that defense is valid or not, it does seem to me that it may be appropriate to say to the court, "You ought to be able to lift that stay pending the outcome."

I do not think we want to put companies in the position where there really is a serious harm suffered without any kind of showing other than our own certification that we think this is anticompetitive.

Mr. Nash. Thank you, Mr. Chairman. I have no further questions.

Senator Hart. Thank you very much. And, again, thank you for the excellence of that prepared statement.

Mr. Kauper. Thank you, Mr. Chairman. And, as I indicated we will be happy to return at any time.

[The prepared statement of Mr. Kauper follows. Testimony resumes on p. 120.]

Prepared Statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division, U.S. Department of Justice

Mr. Chairman and Members of the Subcommittee, I am pleased to respond to this Subcommittee's request to testify on S. 1284, a comprehensive measure designed to increase the effectiveness of antitrust enforcement. I welcome the interest shown by the Congress in this subject. It is obvious that much thought and effort has gone into the proposed legislation.

S. 1284 covers a wide variety of antitrust areas and, because of that, necessarily raises a number of issues for discussion. Title II, which we generally support, would amend the Antitrust Civil Process Act to give the Department of Justice truly effective pre-complaint civil investigatory powers. Title III, on which we will defer to the Federal Trade Commission, would amend the Federal Trade Commission Act to provide increased penalties for not obeying FTC orders or subpoenas. Title IV, which we also generally support, would provide increased *parens patriae* authority to State Attorneys General on behalf of the citizens of their states. Title V provides premerger notification procedures and an automatic injunction against the consummation of mergers or acquisitions challenged by Federal enforcement agencies. With certain amendments, we support the bulk of Title V. Title VI would grant *prima facie* effect in private damage actions to pleas of *nolo contendere* in criminal antitrust actions. Because its adverse effect on our enforcement program outweighs any public benefits, the Department opposes this Title of S. 1284. Title VII contains a number of miscellaneous provisions, including one which would clarify the scope of the Clayton Act which we support with slight modification.

As is plain from the summary, S. 1284 is legislation of an extremely broad scope and generally in what we believe is an affirmative direction. Let me now turn to a discussion of particular provisions.

TITLE II

Title II would amend the Antitrust Civil Process Act to authorize the collection of information in advance of action which might be unlawful, to cover natural persons, and to include oral testimony and written interrogatories. It would also extend the scope of a civil investigative demand ("CID") to include all persons believed to have information relevant to an antitrust investigation.

The Department of Justice strongly urges amendment of the Antitrust Civil Process Act to increase the investigatory authority of the Antitrust Division in civil investigations. As you know, the Administration introduced a bill for this purpose in the 93rd Congress. This bill has been reintroduced in the present Congress. It differs in some respects from Title II, but both recognize the need for broadened investigatory powers if fully effective antitrust enforcement is to be obtained.

In reviewing S. 1284, we have also considered again the Administration bill. Based on that review, as well as comments from persons outside the government, we have concluded that some amendment of the Administration bill is desirable. We continue to support the Administration bill, and we look forward to working with this Committee and its staff on that legislation. My comments today, however, will be directed to the provisions of S. 1284. We support enactment of Title II as amended consistent with the suggestions contained in this testimony.

The considerations supporting enactment of the Civil Process Act in 1962 speak today for extension of the statute. No litigation involves facts more complex and records more extensive than are found in the government's antitrust cases. Collecting the great amount of information needed for successful antitrust enforcement is a task of considerable magnitude. The Antitrust Civil Process Act, as far as it goes, has proven beneficial to our operations. In the years since its enactment, 1626 Civil Investigative Demands have been issued by the Antitrust Division. However, the limited scope of the Act substantially impairs our investigative effectiveness by limiting civil investigative demands to current or past alleged violations, to legal entities not natural persons, to documentary material, and to parties under investigation.

We cannot be dependent upon the voluntary cooperation of industry in our investigatory functions. Although compulsory grand jury process can be used in the investigation of criminal violations under the Sherman Act, the grand jury cannot be used where our intent is only to bring a civil action. Moreover, the Clayton Act is not a criminal statute; under it we must proceed civilly.

S. 1284 clarifies and, to some extent, expands our authority to seek information on incipient violations, an area of some judicial confusion.[1] This is a highly desirable change, since investigations of yet to be consummated mergers will always involve incipient conduct.

The bill would also give the Department the opportunity to compel the production of information from individuals in those cases where it is not voluntarily forthcoming. This, too, is a necessary addition if our investigatory authority is to be equal to the task.

The availability of written or oral testimony, in addition to document production, will also be a very useful investigatory tool. The provision for oral testimony is nothing new. There is ample precedent for it in the state statutes providing antitrust investigatory powers to their attorneys general before institution of any suit. Numerous Federal laws also authorize various departments and agencies to compel the attendance and testimony of witnesses in the course of investigations under the laws which they administer.

Thus, we strongly favor the basic thrust of Title II. There are, however, a number of areas where I believe some change is desirable, and some provisions which I feel are neither appropriate or desirable. I have attached in Appendix A to this testimony specific discussions of these changes. I will concentrate here on what I view as especially important changes, and provisions raising significant policy issues.

Section 201(e), like several other provisions of Title II, seeks to extend the scope of information available under a CID from the traditional "possession, custody or control" standard by adding the words "or may have reasonable means of access to" information. We oppose this extension of the scope. It is inconsistent with, and much broader than, the standard governing civil discovery under the Federal Rules of Civil Procedure. In addition, it is ambiguous and subject to very different interpretations, as well as possible abuse. I would much prefer to see the scope of available information consistent with that contained in the Federal Rules, unless there is some good reason to believe that standard is inadequate. I know of no basis for such a judgment in this context. This rationale would also apply to similar language in Sections 201(i) and 201(j).

Section 201(g) deals with the form of responses to a CID. New subsection (i) deals with the production of documents, and would require a sworn certificate "by a person or persons having knowledge of the facts and circumstances relating to such production. . . ." This could be interpreted as allowing certification, even where the demand was directed at a natural person, by someone other than the person to whom the demand was directed. I have suggested in the Appendix language to cure this ambiguity. A similar problem exists with new subsection (j), and it is also dealt with in the Appendix.

New subsection (k) deals with the procedures for complying with a demand for oral testimony. I have a number of suggestions in this area, most of which are dealt with in the Appendix, but I would like to specifically mention two points which I feel raise significant policy issues.

First, new subsection (k)(1) would allow oral testimony pursuant to a demand to be open to the public, a condition I am sure was not intended by the drafters. The treatment of information obtained through a CID has always been, and would remain under S. 1284, highly restrictive, with areas of use strictly defined. I think this is both appropriate and desirable, 'and should continue. Nevertheless, new

[1] See e.g., *U.S.* v. *Union Oil Co.*, 343 F. 2d 29 (9th Cir. 1965).

subsection (k)(1) merely *permits* an oral examination pursuant to a demand to be held in closed session. I believe that such proceedings should be confidential, with all persons, other than counsel for the person being examined and those necessary to conduct the examination, excluded. Any other standard, it seems to me, is inconsistent with both the letter and the spirit of other provisions of both the Act as it now stands and S. 1284.

Secondly, S. 1284 provides no procedure by which the person examined may obtain a copy of his testimony. I see no reason for the absence of such a procedure. The Administration bill does contain language to that effect, but on reflection, I do not find it adequate either. In addition, there is no provision for certification of the testimony by the person examined, and some ambiguity in new subsection (k)(4), dealing with the right to clarify or complete equivocal answers.

Because of these deficiencies, and because I view this procedure as somewhat analogous to a civil deposition as contemplated by the Federal Rules of Civil Procedure, I believe changes to conform to those Rules is appropriate. Rule 30(e) outlines the procedure for review and corrections by the witness, and provides for signing. Rule 30(f)(2) provides for copies to be furnished to the witness. Similar procedures are appropriate and, with slight modifications in language, should be included in these amendments to the Civil Process Act.

Sections 201(i) and (j) generally describe the uses to which information obtained by CID can be put. These provisions are very similar to that suggested in the Administration bill, but after considerable thought, I believe that they are not sufficiently precise. Section 201(j) as now written would allow *any* use of CID information before any "court, grand jury, or Federal administrative agency" and in the conduct of *any* antitrust investigation. While we believe that information properly obtained through the use of a CID should be available to Division attorneys in agency proceedings, the possible disclosure of such information in all antitrust investigations would have the ironic effect of allowing disclosure by other attorneys in other investigations not permitted to the investigators who obtained the information. The confidentiality of the documents would be substantially impaired if disclosure was allowed outside a judicial, grand jury or agency proceeding. The Appendix contains specific language to correct this problem, and to permit documents to be utilized in oral depositions under this Act.

Finally, we believe that all information obtained through a CID should be available to the FTC, subject to the same limitations placed on the use of the information by the Division. The Appendix contains language to accomplish this purpose.

Section 201(j) also specifically empowers the Division to utilize CID powers to obtain information for use in regulatory agency proceedings. I have no doubt this would be useful, although some may contend it is unfair. The fairness argument, which is really a propriety issue, assumes that the law enforcement function of the Division is the only justification for compulsory process by the Division, although we certainly have access to the discovery procedures of any agency before which we are appearing. But I think it fails to comprehend the true role of the Division. True, we are primarily a law enforcement agency. But especially in recent years, subject to delegated authority from the Attorney General, the Division has become one of the prime advocates of competition policy before federal regulatory agencies. Our efforts in this field have been viewed as particularly important because of the potential impact of agency decisions giving appropriate weight to competition policy, and I believe we have been an affirmative influence in many areas. This activity is increasing and becoming ever more important. The ability to obtain more complete information for use in such proceedings would clearly be advantageous. Thus, we support that provision of Title II, although we would undoubtedly not use this authority in many agency proceedings. In so doing, I should affirmatively state that, after further consideration, we find this approach preferable to that proposed in the Administration bill, largely on pragmatic grounds. Other technical comments are included in the Appendix.

Section 202 as drafted may, in my view, present certain *ex post facto* problems because of the addition of new penalties in S. 1284, and thus I would suggest slight language changes, making clear that the operative portions of Title II may be used in respect to past conduct, but the new penalty provisions would be applied prospectively only.

Finally, the relationship of the Freedom of Information Act and the Civil Process Act, including proposed changes, must be carefully considered. We would

favor clear and complete exemption from FOIA for any information, in whatever form, obtained through a CID. By definition, such information is investigatory and frequently consists of confidential business data. While it would thus probably be exempt from disclosure in any event, we strongly favor specific statutory language to that effect.

In summary, Title II is important and highly desirable legislation, and we strongly support its passage. In some relatively minor respects, its scope appears overly broad; and these provisions should be tightened up. On balance, however, it is, with the changes suggested above and in the Appendix, deserving of early enactment. More than any other provision of S. 1284, Title II will provide immediate and necessary assistance to our enforcement efforts.

TITLE IV

Title IV would grant to the States, through their respective attorneys general, the right to file antitrust suits (1) as *parens patriae* for damages and injunctive relief on behalf of persons residing in their States, (2) as *parens patriae* for damages to the general economy of their States or their political subdivisions, and (3) on behalf of any of those subdivisions with respect to damages sustained by such subdivisions.

I have attached as Appendix B to this testimony my statement last year before the House Judiciary subcommittee on H.R. 12528, which is very similar to the provisions of Title IV. That statement contains my general views on this concept, and I will limit my testimony today to those provisions differing from H.R. 12528 and to some policy observations.

We support the basic concept embodied in the *parens patriae* provisions of Title IV. Realistically, the only alternatives to this approach, so far as individual consumers are concerned, are either no actions or actions brought as class actions under Rule 23. The recent Supreme Court decision in *Eisen* v. *Carlisle & Jacquelin* [2] has provided yet another indication that Rule 23 class actions may not be the optimal vehicle by which the primary pusposes of Section 4—affording a cause of action to private persons that will both supplement the enforcement activities of the federal government and serve as an additional deterrent against future antitrust violations—can be accomplished.

I continue to believe that there is a need for a procedure by which damages can be recovered where antitrust violations have caused small individual damages to large numbers of persons. Without such a procedure, those antitrust violations which have the broadest scope and, often, the most direct impact on consumers would be the most likely to escape the penalty of the loss of illegally-obtained profits. Those whose injuries were too small to bear the burden of complex litigation would have no effective access to the courts. As a result, the goal of deterrence sought by the Clayton Act would be frustrated in those situations where damages fell directly on small consumers or purchasers. Because of the apparent difficulties of utilizing existing procedures for this purpose, a statutory grant of power to the States to bring actions as *parens patriae* on behalf of the State's residents may be both desirable and useful.

However, the relationship between a statutory right of the States to bring an action as *parens patriae* and the provisions of Rule 23 of the Federal Rules of Civil Procedure must be carefully considered. Rights of absent parties, the procedures by which claims should be handled, the methods by which damages could be established, and the subsequent uses to which unclaimed recoveries could be put are all issues very much alive in Rule 23 litigation today. S. 1284, by setting out standards for the resolution of these issues in the antitrust context, seeks to answer the potential questions without reference to Rule 23. This may be the only feasible method of dealing with these problems without becoming enmeshed in the full panoply of Rule 23 and its problems, but this issue, it seems to me, must be carefully evaluated. The status of Rule 23 itself may well be something that should be the subject of future consideration by the Congress: the interface of Rule 23 with this proposed legislation, however, must be part of this Committee's study of S. 1284.

The second provision of subparagraph (a)(1) of proposed section 4C, which would permit States to sue as representative of a class consisting of all of its damaged residents, raises this issue directly. Except for whatever other provisions in this bill would apply to such an action, Rule 23 would apparently be applicable to any

[2] 417 U.S. 156 (1974).

such action; this is the only provision of the bill which appears directly to embody Rule 23. The interface between Rule 23 and this provision may well raise serious questions of interpretation. For example, it is not clear whether this provision is intended actually to define a class for Rule 23 purposes. Such questions could be avoided by deleting any reference to class actions or class representatives. The deletion of this language from proposed subparagraph (a)(1) would, moreover, not seem to create any disadvantages, since the States would have the right to proceed in such situations as *parens patriae* in any event. We would suggest that subparagraph (1) of proposed Section 4C(a) be amended to delete the reference to class actions. The State would, of course, still be free to bring individual actions, or even class actions under the provisions of Rule 23, in its capacity as a purchaser of goods or services, a procedure which has been approved in a number of district courts to date and which I believe is not seriously questioned.

There also remain further difficult issues with respect to the relationship between the *parens patriae* provision in new section 4C(a)(1) and Rule 23. In my testimony on this subject before the House Judiciary Committee. I pointed out that H.R. 12528 in the last session did not deal with the issue of the effect of a *parens patriae* action by the state on behalf of persons residing in that state on independent actions persons within that category might file, individually or pursuant to Rule 23. S. 1284 deals with these issues by providing an opt out procedure, with the judgment being res judicata as to those who do not opt out. This provision may for most purposes be sufficient, but will pose difficult issues with respect to corporate claims, since it will not always be apparent where a corporation resides or what portion of its claim may be encompassed within the suit.

This leads me to the next point, As written, new section 4C(a) is applicable to damages suffered by "persons," which in the absence of contrary language would be defined by 15 U.S.C. 7 to include corporations. In addition to the difficulty raised above, this will also mean lumping together in a single proceeding claims of consumers and firms at different levels of the distribution chain, with a bar in any subsequent action where the claimant does not opt out. The dissimilarity of claims may add to the difficulties of the litigation when it is not essential to do so. In fact, it is individual consumers who are most likely to lack the resources and sizeable claims to initiate their own actions. There is not the same compelling justification for this legislation in relation to corporate damages; in addition, corporate actions are less likely to present manageability problems than are those involving individual plaintiffs. The opt-out provisions of sub-section (b)(2) may ameliorate these problems, since many corporations may in fact opt out (although 30 days is clearly not a sufficient length of time for such a process). It would seem preferable to me, however, to confine *parens patriae* actions to individual claims.

Finally, my tentative feeling is that actions such as those which would be authorized by S. 1284 should not be available for violations of such antitrust statutes as Section 7 of the Clayton Act and the Robinson-Patman Act. The notion that aggregated damage actions for violations of those statutes could be undertaken by a State for its consumers raises the possibility of a quantum jump in damage exposure which would be difficult to measure and which I am not convinced would be justifiable, given the nature of those statutes.

Section 4C(a)(2) does not deal with individual claims, but would authorize the state to recover damages to the general economy of the state or any of its political subdivisions. This provision seems clearly intended to respond to the Supreme Court decision in *Hawaii* v. *Standard Oil.*[3] I continue to be concerned, however, that this right of action, if broadly construed, could conceivably expand the antitrust damage exposure of individuals and companies in an almost unlimited fashion. Damages in such an action would seem to be inherently difficult to quantify and, depending on the scope given to the action by judicial interpretation, perhaps unforeseeable even by the most astute businessman. I have very serious problems with the spectre of massive recoveries based upon unquantifiable and perhaps totally unforeseeable damages multiplied by three. In addition, of course if the worst would come to pass, the possibility would arise of damages on a scale wholly unrelated to the wrongdoer's gain that would result in significant impairment to the viability of those firms from whom such damages were recovered. Such a result in itself could have anticompetitive consequences, since only the largest firms involved in a given violation might survive the financial pressure of such damage awards. Based on these considerations, the Department is opposed to paragraph (a)(2).

[3] 405 U.S. 251 (1972).

Section 4C(a)(3) confers an additional right on the state to sue on behalf of its political subdivisions. I assume that this is intended simply to remove the argument that for Federal law purposes the claims of subdivisions may not be viewed as the claims of the state. This seems unobjectionable. If, however, the provision is also intended to displace state law which may not permit the state to present such claims, it seems to me an unwarranted interference with the state's internal workings.

Let me turn now to proposed 4D. Under this section the Attorney General, once he has brought an action, would be required to notify any state which he "has reason to believe" would be entitled to bring a similar action pursuant to proposed 4C. If a state should decline or fail to bring a damage action, the Attorney General would be authorized to sue in place of the State Attorney General on behalf of residents of the state.

S. 1284 is different from H.R. 12528 in that the Attorney General is only authorized, and not compelled, to bring such actions should the individual state fail to do so. To this extent it is preferable, but this change does not make this provision more desirable. The Department strongly opposes new section 4D and suggests its deletion.

The procedure contemplated by new section 4D is inconsistent with strong federalism and may well create disincentives for those states which do not now have substantial antitrust enforcement programs to implement such activities. The fact that states can recover treble damages under the Clayton Act in effect permits them to operate an antitrust enforcement program at little or no cost to the taxpayer. Not only can the state recover its actual damages, but it may receive additional monies which it can use for more antitrust enforcement or, for that matter, other public purposes. We favor this approach, for it seems to us to assure that there will be more enforcement personnel in the field seeking out and prosecuting antitrust violators. In fact, this is one of the basic purposes underlying Section 4—to provide the incentive for additional enforcement of the antitrust laws at the state level. This is a likely result of new section 4C, but new section 4D could operate against that goal.

In addition, there are technical deficiencies in the provision. It is not clear if the ninety-day period is intended as a statute of limitations on state actions. Are the states foreclosed from suing after ninety days, in the event the Attorney General of the United States declines to act? And if he acts, while it may be presumed the states are foreclosed from suing, or as a practical matter, will not sue the proposed legislation does not itself prevent them from filing actions.

For these reasons, and recognizing that the Attorneys General of a number of states have expressed similar views, we strongly oppose the inclusion of proposed section 4D in this legislation.

Proposed section 4E would permit a state to recover treble damages for the entire amount of overcharges or other damages sustained in connection with any Federally funded state program. The United States would be permitted to intervene in any such action to protect its interests in the fund in issue, and would be empowered to bring an action on behalf of any state which fails or declines to sue within ninety days of a notification from the United States that probable cause for such a state action exists. The United States would be entitled to claim reimbursement of its equitable share of any damages received by a state under this Section, as well as actual expenses. We assume the damages would be the Federal contribution, untrebled. However, the bill is ambiguous on this point.

The current state of the law here is unclear. It has been argued that allowing such recovery by states is in essence permitting treble damages for injury to the United States, a notion arguably inconsistent with Section 4A of the Clayton Act, which permits the United States to recover only actual damages resulting from antitrust violations. On the other hand, the fact that the state funded a portion of one of its programs with monies from the United States instead of from tax revenues or other sources does not change the fact that the damages suffered by the state.

We believe that a state should have the right to recover treble damages for all injuries suffered by state as a result of antitrust violations, regardless of how the programs were funded. Such a position seems most consistent with the primary purpose of Section 4—to create incentives for private actions. Such private actions are significant deterrents to further violations, and it should make no difference that a portion of the funds which financed the injured program come from the Federal government. This position is, incidentially, not inconsistent with Section 4A. Section 4A merely limits the United States to the recovery of actual damages, and implies no limitation on the rights of private parties (including states) to

recover treble damages based on the source of funds or revenues with which the injured activity was financed.

We support the provisions of new section 4E, with one exception. We oppose, for the reasons outlined in our discussion of new section 4D, the authorization of the Attorney General to institute such suits in behalf of the states. The Attorney General would of course in any event continue to have the right to seek damages based on injury to the Federal government.

TITLE V

Title V of S. 1284 establishes a pre-merger notification procedure, pursuant to which substantial companies making stock or asset acquisitions would be required to provide notification and basic data concerning the transaction to the Department of Justice and the Federal Trade Commission sixty days prior to consummation. The bill further provides that if within the waiting period, as defined in the bill, either the Department or the Commission institutes an action challenging the acquisition and certifies that the public interest requires relief *pendente lite*, the transaction shall be stayed until final judgment. New section 23(g) contains further provisions with respect to relief in actions challenging acquisitions where relief *pendente lite* has not been obtained.

We strongly support the pre-merger notification procedure and enhancement of our ability to obtain relief *pendente lite* in concept, although as I will discuss further we believe that there are both a number of ways in which these provisions should be amended and several issues which warrant further study. We are opposed to Subsection (g) of the proposed section 23, for reasons to be discussed below.

Our support for the concept of pre-merger notification is based both upon our desire to know of proposed mergers as rapidly as possible, with as much information as possible, in order to ensure prompt and effective evaluation, and our belief that divestiture of stock or assets after consummation is not, in many if not most cases, an adequate remedy. If we were convinced that divestiture was a satisfactory form of relief, there might be little need to know in advance of proposed acquisitions. We might, instead, simply be discussing post-acquisition relief. But it is clear that divestiture is often not adequate, and that it is far better to seek injunctive relief in advance.

The reasons seem clear. First, there is always a risk that absent action in advance of consummation, assets will be scrambled and the acquired entity cannot subsequently be re-created. The scrambling problem is not confined to assets. Key employees may be lost. Goodwill related to the acquired company may be lost, with the result that a divested firm simply cannot enter on the competitive footing held by the acquired firm when the acquisition occurred. Second, divestiture at best slow, and in some cases might never occur. Market conditions change over time. Firms under divestiture orders may deliberately delay. And while delays go on, anti-competitive consequences go on.

Thus if one agrees that seeking preliminary, preventive relief is the most desirable means of proceeding against unlawful acquisitions, it is necessary that the Department and the Commission have sufficient notice and information to make an evaluation of the acquisition prior to its consummation. The sixty day period provided by this bill will provide such an opportunity in a number of cases.

It is also worth pointing out that pre-merger notification may well benefit the business community, for many firms strongly prefer that any action to challenge an acquisition be filed before the firm has made changes pursuant to the acquisition.

Finally, of course, pre-merger notification will assure that so-called "midnight" mergers, hastily consummated for the very purpose of thwarting effective preliminary relief, will not occur. And by requiring that basic data be submitted with the notification, we can obviate some of the need to search widely scattered public sources for information.

For all these reasons, we support the pre-merger notification provisions in concept. We do, however, believe that these provisions should be amended in several respects, and perhaps clarified in others.

Initially, while we recognize that in a number of acquisitions it will simply not be possible to complete an investigation, with evaluation of all relevant data, within sixty days, and that it may therefore be necessary to extend the sixty day period in some cases, we are concerned that S. 1284 gives the enforcement agencies virtually unbridled discretion to delay. It does so by providing that either agency may, within the statutory sixty day period, request additional information and that the sixty day period is thereby entended until thirty days after the agency

advises that the request has been satisfied. While it is true that the bill does provide for a judicial determination that the demands have been met, if the notification of compliance is unreasonably withheld, this does not seem to me adequate safeguard against undue delay of business activity which is not inherently contrary to the public interest. Moreover, if a merger is to be held up by virtue of unilateral action of the enforcement agencies, there should be an incentive for the agencies to proceed with their evaluation as rapidly as possible.

I would therefore urge that the enforcement agencies should be given the opportunity to request in writing additional information, such request being made within the sixty day waiting period, and, if necessary in order to receive and evaluate that information, to extend the sixty day waiting period. However, an upper limit should be placed on the delay wihch can be required. I would suggest that the maximum delay be thirty days after receipt of the information, up to a maximum of sixty days from termination of the original sixty day period. No transaction, then, could be delayed more than 120 days from the date of notification unless challenged by one of the enforcement agencies.

The argument contrary to the imposition of a mandatory limit is that the company will, be delaying its submission of information, simply run out the waiting period, whereas under S. 1284 as now drafted it will have a strong incentive to produce information as rapidly as possible. This is concededly a risk, the existence of an automatic stay may lessen that risk. On balance, however, the mandatory limit seems preferable.

Subsection (c)(1) of proposed section 23 poses an additional problem. As now drafted, it authorizes the Department to seek additional information through use of the Civil Process Act. By implication, this suggests that information cannot be obtained through other, informal means, although I assume this implication is not intended. The provision may be intended simply to clarify existing law by guaranteeing that the Civil Process Act can be used in connection with acquisition investigations. Such a clarification is desirable, but is more appropriate to the Civil Process Act amendments. Finally, the provision is perhaps deemed necessary as a way of formalizing the request which, in turn, may lead to the extension of the waiting period and to provide a written document against which compliance can be measured. But the provision seems both unnecessary and unwise.

Use of the Civil Process Act can be a slower means of securing information than a variety of informal means. It is, in addition, subject to challege in litigation, and that challege alone may last for many months or even years, well beyond the waiting period. It is true that a corporation anxious to proceed with an acquisition could opt not to comply with a request under the Civil Process Act, and thus avoid further delay, but it is not clear to me that its assertion of its lawful rights should place it in the position of delaying its own acquisition. So far as the type of request which would trigger an extension of the waiting period, any written request should be sufficient, and we would prefer that the legislation remain silent as to the specific method by which the request is made. Acceptance of this suggestion would require appropriate changes in subsection (f)(2), the penalty provision.

Another matter of concern to us is the series of provisions in new section 23 authorizing the Federal Trade Commission, "after consultation with" the Assistant Attorney General, to promulgate regulations for implementation of the notification provisions and, indeed, to expand the coverage of those provisions. To the extent this procedure impacts equally on the Department and the Commission, I can conceive no reason why the Department's role should be confined to that of a consultant. We therefore strongly urge that the language in new Section 23 (b) (2), (3) and (4) be changed to provide that any action by the FTC should be taken only with "the concurrence of" the Attorney General.

Before leaving the pre-merger notification provisions, there are several other issues I raise for this Committee's consideration. The first of these issues relates to the basic coverage of the pre-merger notification requirement.

It is not clear to us how the notification requirement would be applicable to acquisitions of stock through public tender offer. Tender offers frequently arise quickly, and if notification is necessary sixty days before the tender offer is made, such offers may become a thing of the past. There is no inherent reason to suspect such offers, which are in and of themselves purely neutral facts. They may be pro-competitive in some circumstances. As I interpret proposed section 23, the procedure would be complied with if the stock tendered was not actually acquired within sixty days, so that notice on the date of the public offer would be sufficient if actual closing on the shares was delayed sixty days. Such an interpretation could

obviate some of the difficulties otherwise created by Section 23 in the tender offer situation. But the bill is not altogether clear, since a contingent right to acquire shares at a later date could be viewed as an "indirect" acquisition.

Section 23 provides for pre-merger notification of any stock or asset acquisition where the acquiring and acquired corporations have assets above stated amounts. Any transfer between such corporations, whatever the nature of the stock or asset and whatever the size of the acquisition, is subject to the notification requirement and thus to the delay of the waiting period. While we have referred to this as a "pre-merger" requirement, it is in fact far more. Thus, on its face, the bill would require notification of a variety of transactions between corporations above the stated size limits which do not appear to pose competitive issues, such as real estate for corporate use, securities and obligations of a variety of kinds issued by public agencies, bonds of other corporations, acquisitions pursuant to court-ordered reorganizations, and so on. The requirement extends to other types of transactions where the likelihood of anti-competitive consequences is slight, such as acquisitions of voting stock in any amount, regardless of how much is acquired, or acquisition by a parent of the remaining stock of a subsidiary it already fully controls. It might extend to patent assignment . Finally, it appears to extend to acquisitions over which neither enforcement agency has jurisdiction, such as those solely within the jurisdiction of regulatory agencies.

When similar legislation was considered by the Congress some fifteen years ago, the legislation proposed contained some fifteen exceptions to deal with these issues. S. 1284 does contain two provisions of direct relevance. The first is subsection (c)(4) of new section 23, which permits the enforcement agencies to waive the waiting period in particular cases. This does not, however, obviate the need for notification. The most relevant provisions is that authorizing the Federal Trade Commission, after consultation with the Assistant Attorney General, to promulgate general regulations which "except classes of persons and transactions from the notification requirements . . ." after notice and submission of views pursuant to the Administrative Procedure Act. In short, S. 1284 deals with these issues by delegating them to the Commission.

Perhaps this is the most appropriate way to proceed. But this is not self-evident to me. The business community has little concept of what this bill requires of them at the present time. While I am prepared to accept the ultimate combined judgment of the enforcement agencies on these questions, I can understand why the business community might not. Perhaps some exceptions should be left to the Commission, and others written into the statute. At a minimum, there might be some explanation now of what those excepted classes should be. The Department has not finally arrived at judgments on all these questions, but we are prepared to work further with the Committee and its staff in developing the most appropriate answers.

Title V is totally silent on yet another significant issue, the confidentiality of the notification and the information submitted with it. Much of the information submitted would undoubtedly be commercial business information which might be exempt from disclosure under the Freedom of Information Act. Some of the material would seem to fall within the investigatory exemption to that Act, at least during the waiting period. But what of the notification itself? Obviously if the companies are at a point where public disclosure is required under the securities laws this is an academic point, but this may not always be the case. And there may be strong reasons for preserving the confidentiality of the notification. In any event the bill might better deal directly with the confidentiality issues rather than leave them to future litigation and uncertainty.

I turn now to another provision of Title V, the socalled automatic stay. Subsection (d) of new section 23 would require a court to enter an order staying any acquisition challenged by the Department of Justice or Federal Trade Commission upon certification by the relevant agency that relief *pendente lite* is in the public interest. The Department firmly believes that it must have a greater ability to obtain such relief than it presently has, for the reasons I have already set forth with respect to the inadequacy of the divestiture remedy. We have not been successful in obtaining such relief in many cases precisely because courts seem too willing to accept the proposition that divestiture is adequate relief, and thus preliminary relief is unnecessary. But the automatic stay provision in Title V, in our judgment, goes too far. The language of subsection (d) does not provide any discretion to the district court to lift a stay once imposed, even if the enforcement agency does not object. Once again, it does not seem to me appropriate to give such unreviewable and irrevocable discretion to any government agency, even my own, in this manner. I would therefore strongly urge that the district court be

given discretion to lift the stay, but only upon a showing by the defendant of irreparable harm, or that the suit is arbitrary or capricious or otherwise completely without merit. The statute should specifically state that irreparable harm *shall not* include the possibility of loss of anticipated profits from the proposed transaction itself. Any determination by the court to lift a stay should be reviewable before the Court of Appeals, and the stay should remain in effect until the appellate process has run its course.

With such amendments, the Department supports subsection (d) of new Section 23.

We cannot, however, support subsection (g), which establishes a fixed procedure to be utilized when a consummated transaction is challenged. In sum, it requires that when such a challenge is filed under Section 7 of the Clayton Act, or Sections 1 or 2 of the Sherman Act, the court shall determine the purchase price of the acquired stock or assets, require that stock assets or personnel acquired be held separate pending the outcome of the litigation, and that profits obtained from the acquired firm, stock or assets be held in escrow during the litigation. If the government prevails, the court is required to order divestiture of the acquired stock or assets, along with any profits held in escrow, at a price not to exceed the purchase price.

There are obvious interpretative difficulties with this provision. Actions challenging acquisitions may take place years after the acquisition. What, in such cases, is there to hold separate? Profits may not be readily segregated as to acquired assets, and it is not clear how this is to be done. The purchase may have occurred some time past, and the assets may now be different. The purchase price at the time of acquisition may be markedly different than the value at the time of suit. The statute does not deal with these difficult issues, and apparently assumes that the same provisions should be applicable whether suit is filed one day or ten years after acquisition.

The theory of this provision appears to be that a company making an acquisition ought to be able to obtain on divestiture no more than what it paid for it, and should obtain no profit during the period while it held it. This would certainly help to assure willing buyers, who might in some cases in essence purchase the acquired stock or assets with the escrowed profits. It would operate as a strong incentive to cooperate with the government prior to consummation. But, it seems to me, it will also operate as a severe disincentive to mergers generally and, as to those already consummated, may operate quite unfairly. Any firm contemplating merger or other form of acquisition must assume that at some time there is a risk of challenge. Merger cases are seldom black or white. They are often very close calls. And so the firm must recognize that if challenged successfully, it will lose any accrued value in the assets acquired, will presumably not obtain recompense for value added, and must surrender any profits obtained. (While the statute is not totally clear, we believe this means profits earned *after* suit is filed).

This is surely a severe disincentive to merger, and goes well beyond what may be necessary to insure competition. Such a disincentive might be justified if mergers were inherently bad. But this is not so. Many mergers are pro-competitive, or promote efficiencies. Many more are economically or competitively neutral. Generally, unless there is a recognized harm, businessmen should be permitted to make and implement business decisions without the sort of disincentives this provision would create.

If the pre-merger notification, waiting period and judicial stay provisions of S. 1284 are enacted, the justification for subsection (g) becomes even less apparent, for by hypothesis the merger was at least not so clearly unlawful that preliminary relief was sought. Moreover, the delay in bringing an action, where it would perhaps be more appropriate than now to assume that the merger was initially viewed as unobjectionable, would itself be the likely cause of the financial loss imposed upon the defendant.

Finally, subsection (g) as written requires divestiture of the acquired assets in all cases where the acquisition was challenged. In merger cases filed well after acquisition, or in cases under Section 2 of the Sherman Act, it may no longer be clear what those assets are. But more important, divestiture of all acquired assets may not be the only appropriate relief. If the acquired assets encompass ten lines of commerce, and the anti-competitive consequences are present in only one, does it follow that in every single case divestiture of all acquired assets is always desirable? This language in subsection (g) would deprive the Department and the courts of all flexibility with respect to relief, and we strongly oppose it for that reason.

TITLE VI

Title VI of S. 1284 amends Section 5(a) of the Clayton Act, which deals with the extent to which orders terminating government antitrust actions constitute *prima facie* evidence in subsequent private damage actions. As it now stands, Section 5(a) allows a final judgment or decree rendered in any civil or criminal antitrust proceeding brought by the United States to be used as *prima facie* evidence in any subsequent private action or government damage action under Section 4A of the Clayton Act, "as to all matters respecting which such judgment or decree would be an estoppel as between the parties thereto." Section 5(a) excludes from its coverage consent judgments or decrees entered (1) before any testimony has been taken or entered and (2) in government damage actions under Section 4A.

Title VI would make several changes. First, by inclusion in Section 5(a) of the language "or is guilty of an offense under said laws," it presumably seeks to codify the court decisions treating guilty pleas in government criminal actions as *prima facie* evidence in subsequent private treble damage actions. We support this change in the interests of clarity.

Secondly, Title VI would add new paragraph 2 to Section 5(a), providing that a plea of *nolo contendere* in a criminal antitrust proceeding may be used as *prima facie* evidence in any subsequent civil action, "as to all matters in the indictment necessary to sustain a judgment of conviction upon a jury verdict that the defendant was guilty of the offense charged in the indictment." This would presumably include a government damage action brought under Section 4A. Subparagraph (2)(B) would allow any bill of particulars filed in the proceeding to be used to interpret or construe the indictment, and also provide that any court statements on behalf of the defendant in connection with the entry of the plea would also be usable against the defendant as an admission.

Finally, new paragraph (3) would continue the existing exception to the *prima facie* rule dealing with consent judgments or judgments in government damage actions under Section 4A.

The Department is opposed, with the exception noted above, to enactment of Title VI. We do not believe it will produce any more than marginal affirmative benefits, if any, and it could well have a substantial adverse effect on our enforcement program.

I presume that the justification for this proposed change is the belief that it will provide some assistance to private treble damage claimants, thus increasing the deterrance effect of treble damage actions. I have serious doubts about both the premise and the conclusion. In addition, such a change would remove a measure of flexibility in dealing with criminal defendants now available to the Department and the courts, and probably result in the litigation of more criminal actions than now occurs, resulting, in my view, in a waste of resources that would better be utilized in other ways. Let me deal with each of these points in turn.

The substantial liberation of pretrial discovery in recent years, the marked trend toward a highly capable plaintiff's bar, and increased access (through judicial rulings) to subpoenas and other material generated by the government in grand jury proceedings, have lessened whatever need private plaintiffs may have had in the past to rely on a *prima facie* effect to successfully prosecute a treble damage action. For example, a private plaintiff, on a showing of particularized need, can move for the production of documents produced before a grand jury. He can interview grand jury witnesses. He can benefit from remarks of government counsel in open court when the plea is received and when sentence is imposed. He can obtain extensive information through depositions and written interrogatories. The Multi-District Litigation Act [4] and, to some extent, class action rules and procedures have also lessened whatever disparity in the relative strengths of the parties may have existed.

There is also a serious question in my mind as to whether the *prima facie* effect (which of course, is not conclusive [5]) has in fact provided a significant litigating advantage in the past. Although for purposes of settlement discussions it is undoubtedly of at least psychological assistance to have a litigated government decree, if the parties are forced to trial, proof of damages may frequently involve issues common to proof of the violation itself, and thus little time or expense could be saved.

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[4] 28 U.S.C. § 1407.

[5] See *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.* 215 F. 2d 167 (9th Cir. 1954), *cert. den.*, 348 U.S. 912 (1955).

When dealing with a criminal verdict, or more in point, a guilty plea, the advantage is even more doubtful. The leading case on this point, *Emich Motors* v. *General Motors*,[6] involved a jury verdict of guilty. The indictment had listed 26 acts as the means for effecting the conspiracy, and the jury in the criminal case had been correctly instructed that the government need not prove all of these acts for them to convict. One of the allegations in the indictment was that the business of the treble damage plaintiff had been injured by the conspiracy. The plaintiff argued that the prior verdict should be given prima facie effect both as to the existence of the conspiracy and to establish the fact that plaintiff's business was injured by the conspiracy.

The Supreme Court held that the jury verdict in a criminal case should be treated as *prima facie* evidence only as to those matters which would raise a collateral estoppel between the government and the defendent, including "all matters of fact and law necessarily decided by the conviction." The Court held that the trial in the damage case should make the determination of what that meant in a particular case, "upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts." The trial judge in the damage action, the Court held, is to be given wide discretion in these matters, and may give the jury any evidence "necessary or appropriate to use in presenting the jury a clear picture of the issues decided [in the prior case] and relevent to the case on trial." Thus, while a guilty verdict after trial is arguably of some advantage to subsequent private plaintiffs, how much advantage is unclear, and may well vary from case to case depending on a variety of circumstances.

What if there is no trial and no verdict, but only a plea of guilty? While guilty pleas have been held to afford the *prima facie* effect,[7] how is that to be implemented, especially when the indictment contains (as it commonly does) a variety of allegations supporting the general charge? There is no record, no evidence and no jury instructions for the trial judge in the damage action to use as a basis for determining which allegations are to be deemed "necessarily decided." Moreover, decisions subsequent to *Emich* have interpreted it to mean that *prima facie* effect should extend only to facts "importantly involved" in the criminal proceeding [8]—how is that to be determined from a guilty plea? The impact of a guilty plea in subsequent damage actions is obviously uncertain,[9] and a *nolo* plea would raise similar problems.

The language suggested in new paragraph (2)(A) does not appear to solve these problems, nor is it clear that they can be solved. In an indictment charging more than one specific act supporting a general charge, what are "all matters . . . necessary to sustain a judgment of conviction . . .?" Nor does subparagraph (2)(B) provide a way out of this morass. A bill of particulars may not be (and indeed frequently is not) filed in cases which terminate with *nolo* pleas. And a defendant will obviously be circumspect in his court statements to avoid subsequent adverse effects in a damage action. In summary, I doubt that granting a *prima facie* effect to pleas of *nolo contendere* will prove to be of significant advantage to treble damage claimants.

Some would view this analysis as unduly pessimistic. Even assuming it is, I do not believe that the result of this change would be any significant additional deterrent impact. Sherman Act violations are now felonies. The passage of the Antitrust Procedures and Penalties Act in the last Congress raised the maximum corporate fine to $1 million, and extended the maximum prison sentence to three years. In addition, Title IV of S. 1284 will provide for increased deterrence by facilitating *parens patriae* litigation by the states. We may well be reaching a point of diminishing returns on additional deterrence.

Balanced against what I see as minimal and possible illusory benefits, passage of Title VI would, in my opinion, have an adverse effect on the Department's enforcement program. I am certain that, with the new penalities and the much more extensive consent decree procedures enacted in the last Congress, we will be litigating more cases than in the past. If this is coupled with an extension of the *prima facie* effect to *nolo* pleas, the result could severely tax our ability to bring new cases—particularly cases involving structural relief which demand large portions of the resources we have. With the felony penalty attaching, and the

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[6] 340 U.S. 588 (1951).
[7] See *Armco Steel Corp.* v. *North Dakota*, 376 F. 2d 206 (8th Cir. 1967).
[8] See, e.g., *Farmington Dowell Products* v. *Forster Mfg. Co.*, 421 F. 2d 61 (1st Cir. 1970).
[9] c.f. *United States* v. *Guzzone*, 273 F. 2d 121 (2nd Cir. 1959) (guilty plea to indictment charging nine overt acts can not be used in a subsequent civil action brought under the Surplus Property Act to establish a violation of each of the acts alleged).

treble damage liability arguably enhanced, individuals and corporations will see little to gain by the entry of a *nolo* plea.

Of course, this resource argument could be answered by simply increasing our resources, and this might well be a rational course if there were any real public benefits to be gained. But in my view, any significant benefits are highly unlikely. The result would merely be resources wasted, and court dockets even more crowded. Thus, while I appreciate the desire of the sponsors to aid affirmative antitrust enforcement and, as I have testified, feel that much of S. 1284 in fact reaches that goal, Title VI is not worth its price. For these reasons, the Department opposes the enactment of Title VI.

TITLE VII

Let me turn now to Title VII, the miscellaneous provisions. Section 701 proposes to amend the Robinson-Patman Act and Section 7 of the Clayton Act by substituting the words "in and affecting commerce" for the words "in commerce" wherever that term appears.

As we indicated in the pending *American Building Maintenance* case before the Supreme Court, we believe that Congress, in Section 7 of the Clayton Act, exercised, for jurisdictional purposes, the full range of the Federal power as granted in the Commerce Clause. However, if the Congress believes that clarification of that position is necessary or desirable, we suggest that the principle be expressed as follows:

Section 7. That no corporation shall acquire, directly or indirectly, the whole or any part of the stock or the whole or any part of the assets of another corporation, where the activities of either corporation are in or affect commerce and where, in any line of commerce in any section of the country, the effect of such acquisition of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

We wish to defer for the moment on the Robinson-Patman jurisdiction issue. The Administration has under study—which should be completed shortly—the whole question of Robinson-Patman liability and its effect on competitive pricing. Accordingly, we would wish to resolve first the substantive issues, and then propose as part of that package any necessary jurisdictional amendments.

Section 702 would appear to be unnecessary as it largely restates 18 U.S.C. § 28, enacted as part of the Antitrust Penalties and Procedures Act in the last term of Congress. It is not apparent that the last two sentences of new Section 21 add any power or authority which a district court does not already have.

Section 703 again appears to merely codify the existing Federal rules, specifically Rule 37 of the Federal Rules of Civil Procedure. Further, Rule 37(b)(2) provides several additional sanctions to those set forth in new Section 22. Among these are taking as established designed facts as asserted by the party seeking discovery; prohibiting the nondisclosing party from introducing designed material into evidence; staying further proceedings until the order is obeyed; and issuing an order of contempt of court. It is not clear whether new Section 22 seeks to exclude these sanctions from the range of responses available to the court. I see no purpose in such a limitation. Whether or not intended, Rule 37 provides everything and more than is offered by new Section 22.

In spite of the fact that the language does not serve the purpose, I surmise that new section 22 is intended to make new law. It is, I gather, intended to express a Congressional desire that courts press harder those parties who fail to produce evidence because of foreign criminal discovery laws, so as to force the waiver of the application of such laws or to force their circumvention.

Cases which present questions of compelling foreign discovery by using or withholding Rule 37 sanctions require the exercise of delicate judgment in sifting complex facts and in weighing important and conflicting values and policies.

As the Supreme Court has said, the appropriate application of the Federal rule depends upon "the exigencies of particular litigation," upon "the circumstances of a given case." [10]

As reported in a recent law review article, several attorneys and Government officials who are experienced in dealing with the problem of foreign antitrust discovery tend to be satisfied with the way district court judges are presently dealing with this issue under Rule 37.[11]

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[10] *Societe Internationale* v. *Rogers*, 357 U.S. 197, 206 (1958).

[11] Smith, "Discovery of Documents Located Abroad in U.S. Antitrust Litigation: recent developments in the law concerning the foreign illegality excuse for non-production," 14 *Va. Journal of International Law* 747, at 757–760.

They are reported to share a consensus view to the effect that the availability of the threatened sanctions tends to yield substantial production; that courts are slow to find a "good faith inability to comply"; and that instances of our courts being affected by foreign governmental protests to the compulsion of discovery are quite rare.

Given the significant questions of international law and comity among nations which are raised by this issue, compulsion of foreign discovery by Congressional enactment should not be undertaken apart from international diplomatic negotiations seeking the development of international treaties on this matter among nations. Thus, we oppose Section 703 of Title VII.

In conclusion, let me again commend the sponsors of S. 1284 for their efforts, largely successful in my view, to deal with a wide variety of difficult antitrust issues, and urge rapid consideration by the Congress of this legislation with the suggestions discussed in this testimony.

Appendix A

1. *Section 201(b)*

We would oppose the inclusion of the words in clause (f) of Section 2 of the Civil Process Act "including any body acting or purporting to act under color or authority of State law." This language would not aid in the enforcement of a CID, and does not deprive any such body with any defense arising from *Parker* v. *Brown*, 317 U.S. 341 (1943), or elsewhere. Since it is not necessary, it should be deleted as surplusage.

2. *Section 201(c)*

The words "or may have reasonable means of access to" (on lines 8–9 of page 4) and "or may reasonably be able to secure" (on line 10 of page 4) should be deleted as overly broad and inconsistent with Rule 34 of Federal Rules of Civil Procedure. The words "the subject matter of" (on line 11 of page 4) should be deleted as surplusage. The word "examination" (on line 16 of page 4) should be deleted and replaced with the words "inspection and copying or reproduction" to conform to Section 3(b)(2)(ii) of the Civil Process Act.

3. *Section 201(d)*

The language "conduct constituting the alleged antitrust violation which is under" (on lines 23–24 of page 4) should be deleted to conform to the scope of Section 201(a). The words "or the Federal administrative or agency proceeding involved" should be inserted following the word "thereto" (on line 25 of page 4) in order to conform to the authority in Section 201(j). Subsection 3(b)(2)(B)(i) should be moved to follow 3(b)(2)(B)(iii) for purposes of symmetry.

4. *Section 201(e)*

The language "of such alleged antitrust violation" (on lines 11–12 and 17–18 of page 6) should be deleted as unnecessary and arguably inconsistent with the scope of Section 201(a).

5. *Section 201(g)*

The language "or to which he or it has reasonable access" (on lines 11–12 and line 21 of page 8) should be deleted for the reasons stated in No. 2 of this Appendix.

The language governing certification of the responses to demands for production of documents and answers to written interrogatories must be clarified to insure that responses are made and certified by the appropriate person (if a natural person, the person to whom the demand is directed). Thus, new subsection (i) should be amended by adding, following the word "by" (on line 7 of page 8) the words "the person, if a natural person, to whom the demand is directed or, if not a natural person, by". Similarly, new subsection (j) should be amended by adding before the word "to" (at the beginning of line 19 on page 8) the words "by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons responsible for answering each interrogatory,".

In addition, new subsection (j) should be amended to provide that objections to particular interrogatories may be submitted in lieu of answers. To accomplish this, subsection (j) should be amended by adding, following the word "oath" (on line 16 of page 8) the words "unless it is objected to, in which event the reasons for objections shall be stated in lieu of an answer,".

Also, it is probably desirable for sake of conformity to amend new subsection (j) by adding, following the word "possession" (on line 20 of page 8), the words "custody, or control".

New subsection (k)(1) should be amended by deleting the word "may" (on line 11 of page 9) and inserting in its place the word "shall."

New subsection (k)(4) should be deleted and replaced with the following:

When the testimony is fully transcribed, the transcript shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcript by the officer with a statement of the reasons given by the witness for making them. The transcript shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the transcript is not singed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sing together with the reason, if any, given therefor.

The officer shall certify on the transcript that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness and promptly send it by registered or certified mail to the investigator. Upon payment of reasonable charges therefor, the investigator shall furnish a copy of the transcript to the witness only, except that such witness may for good cause be limited to inspection of the official transcript of his testimony.

6. *Section 201(i)*

In order to insure that documents or interrogatories obtained pursuant to the Civil Process Act may be used in oral testimony proceedings under the Act, the following language should be added to subsection (c) of Section 4:

Any documentary material described in subsection (b)(2) of Section 3 or interrogatories served pursuant to this Act may be used in connection with any oral testimony taken pursuant to this Act.

In addition, in order to clarify that CID materials may be used internally within the Antitrust Division during the course of any investigation, the following language should be added following the phrase "Department of Justice": ", for such use as such officer, member or employee determines to be required. No such material shall be disclosed, except as provided under subsection (d) of this Section."

7. *Section 201(j)*

The words "of the Antitrust Division" (on lines 23–24 of page 12) should be deleted as overly restrictive and unnecessary, and to make clear that United States Attorneys are included. The words "or to conduct any antitrust investigation" (on lines 1 and 2 of page 12) should be deleted. The words "grand jury, or" should be inserted after the word "case" (on line 9 of page 12). The words "or investigation" (on line 10 of page 12) should be deleted. These changes to subsection (d)(1) would limit the external use of CID information to formal proceedings, and would not permit its external use in other antitrust investigations, except to the extent permitted in Section 201(i) as suggested to be amended in No. 6 of this Appendix.

In paragraph (2) of subsection (d), the words "Antitrust Division" (on line 17 of page 12) should be deleted, and replaced with the words "Attorney General, or the Assistant Attorney General in charge of the Antitrust Division". This would conform to the language of other provisions of the Civil Process Act. The words "while participating in any Federal administrative or regulatory agency proceeding" (on lines 17 and 18 of page 12) should be deleted. The word "such" (on line 20 of page 12) should be deleted and replaced with the words "any Federal administrative or regulatory agency proceeding". This will make clear our authority to seek information before we formally become a party in any such proceeding, and would conform to the general concept of the CID as a precomplaint investigatory tool.

Paragraph (2) of subsection (d), as amended in conformance with the suggestions contained in this Appendix, should be re-numbered (3), and a new paragraph (2) should be inserted, as follows:

The antitrust investigator or investigators having custody and control of any documentary material described in subsection (b)(2) of Section 3, interrogatories served pursuant to this Act and answers thereto, or transcripts of oral testimony taken pursuant to this Act may deliver to the Federal Trade Commission, in response to a written request, copies of such documentary material, interrogatories

and answers thereto, or transcripts of oral testimony for use in connection with an investigation or proceeding under its jurisdiction. Upon the completion of any such investigation or proceeding, the Commission shall return to the antitrust investigator or investigators any such materials so delivered and not having been introduced into the record of such a case or proceeding before the Commission. While such materials are in the possession of the Commission, it shall be subject to any and all restrictions and obligations which this Act places upon the custodian of such documents while in the possession of the Antitrust Division of the Department of Justice.

8. *Section 201(1)*

The word "had" (on line 15 of page 13) should be "has".

9. *Section 201(r)*

All words following the word "Act" (on lines 17 and 18 of page 16) should be deleted. The deleted language is unnecessary in view of the availability of other criminal sanctions under Section 201(g).

10. *Section 202*

The words "the provisions providing for the production of documents or information" should be added following the word "and" (on line 20 of page 16). This would eliminate any possible *ex post facto* problem.

Appendix B

I am pleased to respond to the Committee's invitation to testify on H.R. 12528, a bill to permit the several States to seek redress for their citizens and political subdivisions for damages suffered as a result of violations of the antitrust laws. H.R. 12528 would work major changes in this area.

Broadly, H.R. 12528 would grant to the States the right, through their respective attorneys general, to sue for damages to citizens of that state as a result of antitrust violations, either through the device of a class action or in the role of *parens patriae*. H.R. 12528 would also have a major impact on the establishment and calculation of damages in any such action. The bill provides that, in such an action, the separate damages of each citizen need not be individually proven, but those of all citizens of a State can instead be aggregated, and that proof of damages may be made by various statistical or allocatory methods. The bill further provides for methods of distribution of any funds recovered.

H.R. 12528 also provides that a State may bring an action, again in the role of *parens patriae*, for damages from such violations to the "general economy" of the State.

Finally, H.R. 12528 contains two provisions directly involving the Attorney General of the United States. The first, contained in New Section 4D, provides that the Attorney General shall, in certain circumstances, notify the various States of the possibility that those States may have an action for damages arising from an antitrust violation. In the event of the failure of those States so notified to bring such an action within a certain time period, the Bill further provides that the Attorney General shall himself initiate such an action, as *parens patriae* for the citizens of that State. New Section 4D contains further provisions governing the measure of damages and the distribution of monies recovered in such suits brought by the Attorney General of the United States.

The second provision directly affecting federal interests in New Section 4E, which provides for recoveries by states with respect to federally funded State programs. The Attorney General is given the right to intervene in such actions, and also is given the power to initiate actions on behalf of States which do not do so under circumstances similar to those described above with respect to New Section 4D. Provision is also made for allocating any monies recovered in such an action.

This is a relatively short bill, as proposed legislation goes; its size, however, is no measure of its potential importance. The provisions of this bill, if enacted into law, would be likely to have a dramatic impact on State activity under the antitrust laws. The issues here are difficult as well as important; there are countervailing considerations which must be balanced before a reasoned judgment is possible.

Section 4 of the Clayton Act now provides that any person injured in his business or property as a result of a violation of the antitrust laws may bring an action to recover three times the damages suffered. Section 4 has been interpreted to

include a State in the definition of "person," and thus a State may clearly maintain an action in its proprietary capacity for any damages suffered. There seems no logical reason why a State could not also bring such an action, under Rule 23 of the Federal Rules of Civil Procedure, as the representative of all persons similarly situated, and in fact the Courts have generally allowed such actions where the other criteria of Rule 23 are met.[1] Judge Sirica's recent decision in the *Apicilmlin* litigation contains perhaps the most through exposition on this point.

There are, however, some questions whether this procedure, even if available, is sufficient to enable the States to protect their citizens from antitrust violations. As a result, States have in recent times turned to an alternative procedure, that of suit in their historical role of *parens patriae.* Recent judicial decisions have, however, limited the rights of States to bring such actions.

The States have attempted to move as *parens patriae* in two different ways. First, they have sought to sue on behalf of all injured citizens of the States; second, they have sought to recover damages to the general economy of the State. In *Hawaii* v. *Standard Oil*,[2] the Supreme Court held that Section 4 of the Clayton Act did not authorize a State to sue for damages to the "general economy" of the State, basically because such injury, even if proven, did not qualify as injury to its "business or property" as required by the statute. The Court specifically did not rule on whether Hawaii could sue, *parens patriae*, on behalf of its injured citizens; such a claim had originally been made by Hawaii and dismissed by the district court, but that issue was not before the Supreme Court for its review.

However, one year later in *California* v. *Frito-Lay*,[3] the Ninth Circuit Court of Appeals held that a *parens patriae* action by California to recover damages sustained by its citizens, while possibly desirable and perhaps even essential "if antitrust violations [of particular kinds] are to be rendered unprofitable and deterred" was not justified by the historical recognition of the *parens patriae* role of States this country and thus could not be upheld in the absence of specific statutory authorization. The Court of Appeals, however, explicitly made no findings on the desirability of such an authorization, leaving that to the legislature, "where careful consideration can be given to the conditions and procedures that will suffice to meet the many problems posed by one's assertion of power to deal with another's property and to commit him to actions taken in his behalf."

The first provision of sub-paragaph (a)(1) of New Section 4C would provide that a State could seek to recover damages sustained by its citizens in an action brought by the State as *parens patriae.* Such an action by the State would not be a class action as such, and would not be subject to Rule 23 requirements.

We support the basic concept embodied in this provision of H.R. 12528. The alternatives are either no actions on behalf of individual consumers, or actions brought as class actions under Rule 23. While the provisions of Rule 23 have yet to be authoritatively interpreted,[4] there are indications that a Rule 23 class action may not be the optimal vehicle by which the primary purposes of Section 4—affording a cause of action to others that will both supplement the enforcement activities of the federal government and serve as an additional deterrent against future antitrust violations—can be accomplished.

Rule 23 is basically a procedural vehicle for the efficient and expeditious resolution of multiple claims.

H.R. 12528 seeks to remove these limitations on the ability of States to act in their role of *parens patriae.* As described by the Advisory Committee which drafted the Rule, it was intended to provide "economies of effort and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about undesirable results." Advisory Committee Notes, *Proposed Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 73, 102–03 (1966).

Section 4 of the Clayton Act (along with Section 16), on the other hand, were intended at least in major part to provide incentives to what have been described as "private attorneys general" to bring actions in which they could recover treble damages. This legislation was intended to, and I am convinced does, serve as an additional and substantial deterrent to those contemplating activities which might violate the antitrust laws. It has always been my impression that the private

[1] In re *Ampicillin Antitrust Litigation*, 55 F.R.D. 269 (D.D.C. 1972), *aff'd sub nom., State of Illinois* v. *Bristol-Myers Co.*, 470 F. 2d 1276 (D.C. Cir 1972); In re *Antibiotic Antitrust Actions*, 333 F. Supp. 278 (S.D. N.Y. 1971).

[2] 405 U.S. 251 (1972).

[3] 474 F. 2d 774 (9th Cir. 1973).

[4] A case involving Rule 23 is, however, currently pending in the United States Supreme Court. *Eisen* v. *Carlisle & Jacquelin*, No. 73-203 (argued Feb. 25, 1974).

action and treble damage provisions of the Clayton Act demonstrate the strength and depth of the national commitment to competition and a free marketplace.

There can be no doubt that the treble damage remedy provides a strong deterrent, especially against price-fixing and other hard-core *per se* offenses. This damage remedy has been particularly effective in cases involving large purchasers, for these plaintiffs are likely to have detailed evidence, a sufficiently large economic stake to bear the inevitable risks of a lawsuit, and the resources to meet the apparently inevitable costs of protracted and complex litigation. However, the remedy has been less effective in circumstances involving multiple transactions of relatively small size, particularly purchases by ultimate consumers of products that may cost as little as 25 or 30 cents. There, records are not likely to be available, individual claims will be small, and the claimants less likely to have either the sophistication or resources necessary to prosecute their individual claims.

Rule 23 was seen by some as a possible answer to this problem. In fact, it has not proved to be the panacea sought by some for a variety of reasons. Foremost among these, in my opinion is that it was not drafted for the purpose of facilitating the type of litigation we are here discussing. Rule 23 was intended to provide a method of consolidating multiple lawsuits, to make one case where there were many. In those situations involving multiple small claims, there are (in the absence of Rule 23 or something similar) rather than many federal cases likely to be none. In fact, in those situations, Rule 23 may encourage suits where otherwise none would be brought but, because the Rule was not drafted with this type of litigation in mind, it is not surprising that various provisions of Rule 23 have sometimes been interpreted in ways which hamper the maintenance of such actions.

I believe that there is a need for the availability of a method by which damages can be recovered where antitrust violations have caused small individual damages to large numbers of citizen-consumers. Without such a procedure, those antitrust violations which have the broadest scope and, often, the most direct impact on consumers would be the most likely to escape the penalty of the loss of illegally-obtained profits. Those whose injuries were too small to bear the burden of complex litigation would have no effective access to the courts. As a result, the goal of deterrence sought by the Clayton Act would be frustrated in those situations where damages fell directly on small consumers or purchasers. It may be that Rule 23 will yet prove to be an appropriate vehicle for the resolution of such claims. The Supreme Courts' decision in *Eisen* v. *Carlisle & Jacquelin*, now pending, will provide a strong indication as to the future viability of Rule 23 as a vehicle for antitrust class actions by consumers.

In the meantime, however, a statutory grant of power to the States to bring actions as *parens patriae* on behalf of the State's citizens may be both desirable and useful. There are, however, several significant issues which I believe must be carefully considered by this Committee before it reaches that judgment.

The first is the question of potential duplicative recovery. It is clear that the possibility of duplicative recovery was one of the reasons for the Court of Appeals decision in *California* v. *Frito-Lay*. Should the Congress authorize a State to bring an action as *parens patriae* for damages suffered by its citizens, and some of those citizens seek independent recoveries, individually or by class action, the result could in effect be the doubling of already trebled damages. H.R. 12528 as currently drafted contains no provision to deal with this possibility. If the Congress determines, as it could rationally do, that a State is an appropriate and adequate representative of consumer interests, it must also decide whether those represented in such an action should be individual consumers or all purchasers, including businesses, corporate and otherwise. I believe that such an action should be limited to individual consumers, since they would be most likely to not have the resources and potential claims to initiate their own actions. It would also seem that such actions should be undertaken by the States only when a substantial portion of their citizen-consumers are affected. This will have the dual purpose of limiting State actions under this legislation to those situations most likely to be difficult to maintain under existing procedures, and focusing State activity on the most widespread violations. It would also help to alleviate the double recovery problem.

Consideration must also be given to limiting duplicative litigation by the citizens of any State which has brought an action under this legislation. This could (and perhaps, to be workable, must) go so far as to prohibit all actions by represented consumers, and providing that such consumers shall not be included in any broader action initiated or maintained by someone not represented by the State through such an action.

It can be argued that an absolute prohibition—without a chance to opt out as is presently available in Rule 23 class actions—would create due process problems. I agree that the issue is far from clear, but I think a responsible argument can be made that representation by a State of its citizens' interests, especially when those interests involve a large number of small, poorly-defined individual claims, is adequate representation of the sort which insures due process to individual claimants, especially where those individuals would have a right to present their claims against any fund eventually recovered by the State. Moreover, in the antitrust context, the private right of action afforded is a statutory right, and a statutory right which waives the ordinary jurisdictional amount requirement for access to the federal courts. Especially from an antitrust deterrence point of view, it is difficult to justify preserving the theoretical rights of a few people to bring individual actions if the result is the inhibition or total exclusion of the great bulk of claims and the resulting immunization, as a practical matter, of the wrongdoer and his illegal gains.

A second major question is the relationship between a statutory right of the States to bring an action as *parens patriae* and the provisions of Rule 23. Rule 23 sought to deal with many issues which would also be raised by a *parens patriae* provision such as that contained in H.R. 12528. In addition to the rights of absent parties which I have just discussed, the procedures by which claims should be handled, the methods by which damages could be established, and the subsequent uses to which unclaimed recoveries could be put are all issues very much alive in Rule 23 litigation today. H.R. 12528, by setting out standards for the resolution of these issues in the antitrust context, seeks to answer the potential questions without reference to Rule 23. This may be the only feasible method of dealing with these problems without becoming enmeshed in the full panoply of Rule 23 and its problems, but this issue, it seems to me, must be carefully considered by this Committee. The status of Rule 23 may well be something that should be the subject of future consideration by the Congress; the interface of Rule 23 with this proposed legislation, however, must be part of this Committee's study of H.R. 12528.

The second provision of paragraph (a) of New Section 4C, which would permit States to sue as representative of a class consisting of all of its damaged citizens, raises this issue directly. Except for whatever other provisions in this bill would apply to such an action, Rule 23 would apparently be applicable to any such action; this is the only provision of H.R. 12528 which appears directly to embody Rule 23. The interface between Rule 23 and this provision may well raise serious questions of interpretation, and thus create litigation opportunities, which could be avoided by deleting any reference to class actions or class representatives. The deletion of this language from subparagraph (a)(1) would, moreover, not seem to create any disadvantages, since the States would have the right to proceed in such situations as *parens patriae* in any event. In light of these facts, we would suggest that sub-paragraph (1) of New Section 4C(a) be amended to delete the reference to class actions. The State would, of course, still be free to bring individual actions, or even class actions under the provisions of Rule 23, in its capacity as a purchaser of goods or services, a procedure which has been approved in a number of district courts to date and which I believe is not seriously questioned.

Finally, this Committee should consider whether, without a full reassessment of the treble damage provisions and their role in antitrust enforcement, actions such as those which would be authorized by H.R. 12528 should be available for violations of such antitrust statutes as Section 7 of the Clayton Act and the Robinson-Patman Act. The notion that aggregated damage actions for violations of those statutes could be undertaken by a State for its consumers raises the possibility of a quantum jump in damage exposure which would be difficult to measure and which I am not convinced would be justifiable. In any event, it is a matter which deserves serious study.

Let me turn now to paragraph (b), which deals with the measurement of damages. This is one area which has proven to be of difficulty in actions involving great numbers of small individual claims, which are the most likely kind of actions to be encouraged by New Section 4C(a)(1). There is considerable controversy today, in class action litigation and the literature arising therefrom, about the propriety of various methods of ascertaining the proper amount of damages to be recovered from one as to whom liability has been established.[5]

Paragraph (b) of New Section 4C is intended to remove the uncertainties as to the validity of certain methods of establishing and measuring damages in those

[5] See, e.g., Handler, "Twenty-Fourth Annual Antitrust Review," 72 *Col. L. Rev.* 1, 34-42 (1972); Freeman, "Class Actions from the Plaintiffs' Viewpoint," 38 *J. Air L. Com.* 401, 409-412 (1972).

cases initiated by States on behalf of injured citizens. On the merits, the standards suggested seem to us appropriate ones. There is little doubt that scientific methods of measuring damages through statistical sampling and other devices are available.[6] In addition, at least in the context of Sherman Act violations, we see little merit in the proposition that one whose antitrust liability is established is entitled to retain the proceeds of his illegal acts, absent a definitive showing by each individual damaged of both that fact and the precise amount of injury. A person or corporation whose hardcore violation of the Sherman Act has been established is the equivalent of a thief; he has obtained money from persons that he had no right to take. The questions of whether that money should be denied him, and to whom it should go, seem separable and not necessarily dependent issues. The argument that aggregated damage awards will allow damages to be awarded to those unwilling or unable to assert their claims is not compelling, especially if a major goal of such actions is deterrence. Moreover, who actually receives the money as a result of such an action is secondary to the main goal of depriving the wrongdoer from retaining the "pot of gold" resulting from his illegal acts. Assuming it can be adequately established that a certain amount of monies were received by an antitrust violator as a result of his violation, he should as a matter of policy be liable to a forfeiture of that amount and whatever incremental amount Congress may decide is appropriate, to the benefit of all parties injured. In an action where the State is representing its damaged citizens, the State would seem to be an appropriate receiver of the damages, subject to the rights of all damaged parties to claim their pro rata share.

I do think it is appropriate to emphasize one point. It would seem highly desirable, whether in a class-action under Rule 23 or in a procedure such as the one envisioned in New Section 4C(a)(1) of this bill, that all citizens for the benefit of whom the State is acting have the opportunity to claim their share of recovered damages prior to any other use or disposition by the State, regardless of the presence or absence of specific State laws. To the extent that this is the intent of the bill, as I believe it is, it may be desirable to clarify subparagraph (b)(2) of New Section 4C accordingly.

Finally, to the extent that any monies recovered are not fully claimed by injured individuals, the use of the fund according to State law or pursuant to the doctrine of *cy pres* under the direction of the district court seems to me to be the most appropriate provision imaginable. The Department supports New Section 4C(b).

Sub-paragraph (a)(2) of New Section 4C would provide that a State can also bring an action as *parens patriae* for damages "to the general economy of that state or any political subdivision thereof." This provision seems clearly intended to respond to the Supreme Court decision in *Hawaii* v. *Standard Oil*. There, the Court held that Section 4 of the Clayton Act did not authorize a state to sue for such damages, basically because such injury, if proven, did not qualify as injury to its "business or property" as required by the statute.

H.R. 12528 would remove this statutory impediment. It would not, however, deal with what the Court in *Hawaii* saw as the danger of duplicative recoveries inherent in the allowance of such an action. The only effective guard against such a possibility would be for the Congress to make clear, perhaps in legislative history, that damages recoverable by such an action should be limited to those arising from illegal actions shown to have adversely affected the State's economy or retarded its economic development in some way independent from or in addition to the damage suffered by consumers located within that State. In those situations where a State can show an interest independent from that of particular citizens, or perhaps in situations where damage to the general public which may not be individually compensable can be shown, the danger of duplicative recovery would be lessened or eliminated.

Even assuming that the potential of duplicative recovery can be ameliorated, I have serious reservations about the creation of this new right of action. Generally, I believe that provable damages resulting from an antitrust violation should be recoverable at law. The right of action created by subparagraph (a)(2), however, if broadly construed, could conceivably expand the antitrust damage exposure of individuals and companies in an almost unlimited fashion. Damages in such an action would seem to be inherently difficult to quantify and, depending on the scope given to the action by judicial interpretation, perhaps unforeseeable even by the most astute businessman. I have some problem with the spectre of massive

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[6] We recommend inserting the word "or" between "statistical and "sampling" in this passage, since there may be other valid statistical methods besides sampling that could be used to estimate damages.

recoveries based upon unquantifiable and perhaps totally unforeseeable damages multiplied by three. In addition, of course, if the worst would come to pass, the possibility would arise of damages on a scale, wholly unrelated to the wrongdoer's gain, that would result in significant impairment to the viability of those firms from whom such damages were recovered. Such a result in itself could have anticompetitive consequences, since only the largest firms involved in a given violation might survive the financial pressure of such damage awards.

Let me turn now to New Section 4D. Under this section, the Attorney General, once he has brought a damage action under Section 4A of the Clayton Act, would be required to notify any State which he "has reason to believe" would be entitled to bring a similar action (presumably under New Section 4C of this bill) that "would probably lead to a substantial recovery of damages." Under such language, the Attorney General is asked to make judgments that will be very difficult, both as to the possibility of liability of the prospective defendants to the citizens of the several States and the substantiality of the potential recovery in such actions.

Once he has made these difficult judgments, and following any notification, those States notified would have 90 days to decide whether they should file such an action. This would place a substantial burden on the States, since the complexity of such cases may well make the 90-day period wholly inadequate for proper analysis of their rights, responsibilities and possibilities of success. This would be especially true for smaller States, with fewer resources available in State Attorneys General offices.

Finally, should those States notified either fail or decline to bring such an action within that 90-day period, the Attorney General is directed to institute an action, as *parens patriae*, in place of the State. Such a requirement could create serious problems. The State may have declined to sue because it concluded there was not a sufficient legal basis for such an action, a conclusion not necessarily inconsistent with the Attorney General's previous finding that he had "reason to believe" the opposite. This provision, since it removes all discretion from the Attorney General, could very well require the institution of law suits which are not justified by any conclusion of probable liability or reasonable likelihood of success. In addition to the potential conflict between the Attorney General's duties under this proposed section and his inherent responsibilities as a lawyer and an officer of the Court, this provision could result in increased pressure on an already overcrowded judicial system which is neither required nor, in the final analysis, warranted.

More importantly, even if those problems outlined above were either soluble or solved, New Section 4D could place impossible burdens on an already undermanned Antitrust Division. It is reasonable to presume that the combination of the short time period for State review and the strained legal resources of many States would result in a significant portion of such cases reverting to the Attorney General, who would be required by statute to institute suit. Even if all the affected States but one determined to bring suit, the Attorney General would still have to sue on behalf of that one State. This could create intolerable burdens, and it is conceivable that all or most of the Division's resources would have to be devoted to such cases, at the expense of criminal enforcement, actions against illegal mergers, and appearances before the various regulatory agencies.

In addition, this procedure may well create disincentives for those States which do not now have substantial antitrust enforcement programs to implement such activities. The fact that States can recover treble damages under the Clayton Act in effect permits them to operate an antitrust enforcement program at little or no cost to the taxpayer. Not only can the State recover its actual damages, but additional monies which it can use for more antitrust enforcement or, for that matter, other public purposes. We favor this approach, for it seems to us to assure that there will be more enforcement personnel in the field seeking out and prosecuting antitrust violators. In fact, this is one of the basic purposes underlying Section 4—to provide the incentive for additional enforcement of the antitrust laws other than by the Federal Government. This is a likely result of New Section 4C; New Section 4D could operate against that goal. For these reasons, we oppose the inclusion of New Section 4D in this legislation.

New Section 4E would permit a State to recover treble damages for the entire amount of overcharges or other damages sustained in connection with any federally-funded State program. The United States would be permitted to intervene in any such action to protect its interests in the fund in issue, and would be empowered to bring an action on behalf of any State which fails or declines to sue within 90 days of a notification from the United States that probable cause

for such a State action exists.[7] The United States would be entitled to claim reimbursement of its equitable share of any damages recovered by a State under this Section. We assume the latter would be the federal contribution, untrebled.

The current state of the law on this point is unclear. It has been argued that allowing such recovery by States is in essence permitting treble damages for injury to the United States, a notion arguably inconsistent with Section 4A of the Clayton Act, which permits the United States to recover only actual damages resulting from antitrust violations. On the other hand, the fact that the State funded a portion of one of its programs with monies from the United States instead of from tax revenues or other sources does not change the fact that the damages suffered were suffered by the State.

We believe that a State should have the right to recover treble damages for all injuries suffered by a State as a result of antitrust violations, regardless of how the programs were funded. Such a position seems most consistent with the primary purpose of section 4—to create incentives for private actions. Such private actions are significant deterrents to future violations, and it should make no difference that a portion of the funds which financed the injured program come from the federal government. This position is, incendentally, not inconsistent with Section 4A. Section 4A merely limits the United States to the recovery of actual damages,[8] and implies no limitation on the rights of private parties (including States) to recover treble damages based on the source of funds or revenues with which the injured activity was financed.

While we support the inclusion of New Section 4E, we would suggest certain changes in language. First, we would suggest that it be expressly stated that, in those instances where the United States should initiate an action for a State under New Section 4E, the United States could recover for the State the same amount of damages that the State could if it sued. Second, we would suggest that the references to regulations be deleted, and replaced with a provisiln that provides for the reimbursement of the United States for its expenses, if any, in prosecuting an action under 4E, under the direction of the District Court.

In your invitation, you also asked for a discussion of the manner in which the Antitrust Division acquires, evaluates, and disseminates information concerning anticompetitive practices. Obviously, the Division receives information from varied sources, including a not insubstantial number of complaints from businessmen or consumers who feel they have been injured. The Division also develops and analyzes economic data, largely through its Office of Economic Policy, with the purpose of identifying those areas of the economy which show indications of interference with free market allocation or pricing functions. We frequently conduct informal investigations which rely on voluntary compliance with requests for information. The most commonly used investigatory tools, however, are the grand jury and the Civil Invesitgative Demand as authorized by the Antitrust Civil Process Act.

The grand jury is an important investigatory tool, but its usefulness is limited to those situations in which we have reason to believe a criminal violation or the antitrust laws may have occured. In fact, court decisions have made it clear that a grand jury cannot be purposely utilized to investigate and prepare a civil action. Thus, since the majority of our investigations and cases are civil cases, the grand jury is of limited value in many situations.

The CID is potentially a very useful investigatory tool. As it stands now, however, the CID is limited to the production of documents, and then only from persons under investigation. It cannot be used to compel testimony, nor can it be utilized against persons not under investigation, even if they may have information highly relevant to the investigation. At least one court decision has also raised doubts as to the propriety of a CID when the investigation is centered on incipient conduct, such as a proposed merger.[9]

The Department has prepared legislation to be submitted to this Committee which would extend the coverage of the Antitrust Civil Process Act to (1) include persons (including natural persons) in addition to those under investigation, who

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[7] While the language of New Section 4E indicates that the United States would not be required to bring such an action, we think it should be expressly stated that the United States is under no obligation to exercise the power granted by New Section 4E. We would oppose, for many of the same reasons stated in our discussion of New Section 4D, any language which could be interpreted as requiring action by the United States should States decline or fail to bring their own suits.

[8] One issue that should be clarified is the effect, if any, that action taken under New Section 4E would have on the right of the United States to bring its own action based on a federal contribution to a State program.

[9] *United States* v. *Union Oil Company of California;* 343 F. 2d 29 (9th Cir. 1965).

may have information relevant to a particular antitrust investigation, and (2) to permit the service of written interrogatories and the taking of oral testimony. This proposal would also remove any doubt that CIDs may issue to require information relating to incipient violations and specifically provide that evidence obtained through the use of CIDs may be used in investigations and cases in addition to the specific investigations to which the CID relates and any case resulting therefore.

No field of litigation involves facts more complex and records more extensive than are found in the Government's antitrust cases. The task of amassing the voluminous data essential to successful antitrust enforcement is of considerable magnitude. Insofar as it went, enactment in 1962 of the Antitrust Civil Process Act provided a signal benefit to the Government's civil investigations by authorizing production of relevant documents from corporations, associations, partnerships, or other legal entities not natural persons, under investigation. But the limitations on the scope of the Demand have left the Act far from meeting essential investigatory needs of the Department's Antitrust Division.

This proposal would simply make available to the Attorney General the same antitrust investigatory powers in civil investigations that he now has in criminal investigations, and provide him with authority similar to that of the Federal Trade Commission. Enlarged discovery would not only materially assist investigation of facts leading to decisions on the filing of civil actions, but will facilitate the reaching of decisions on whether to resort to grand jury proceedings.

Insofar as dissemination of information is concerned, the Department is frequently limited by both statutory and policy considerations on what kind of information may be disseminated. For example, the Federal Rules of Criminal Procedure, specifically Rule 6(e), expressly forbid the dissemination of information obtained by a grand jury in the course of its investigation other than in a subsequent judicial proceeding or by order of the Court. Similarly, the Antitrust Civil Process Act, 15 U.S.C. § 1313(c), restricts the availability of information obtained through the use of a Civil Investigative Demand. Policy considerations argue against the announcement of pending investigations or access to investigatory files, especially when such announcements or access might in some way prejudice the conduct of the investigation, adversely affect the parties under investigation, or expose individuals or firms which provide information to the Division to harrassment or reprisals.

Where these restrictions are not applicable, the Department has been and remains willing to assist other public agencies to the greatest extent possible. This is especially so for state enforcement agencies. The Department makes every attempt to assist state antitrust agencies,[10] although the pressure on our resources undoubtedly limits our ability to provide as much help as either the State agencies or the Department would desire.

You also asked for a discussion of the Antitrust Division's plans to deal with shortage situations and the competitive problems that occasionally arise from such conditions. The Division is keenly aware of the shortage situations that exist in some areas of the economy, not only in oil but also in such diverse commodities as chemicals and paper. We have received a number of complaints which seem to relate to shortage conditions and we will continue to investigate any such complaints we receive. I should poin t out that many of the shortage situations we are facing today have been aggravated, if not created, by the existence of price controls. Without quarreling with the merits of a decision which, on balance, might favor control over the price of certain commodities at certain times, there is no doubt that the existence of such controls can discourage production, encourage exports to non-control areas, or in other ways directly affect the availability of the product, sometimes to the point of shortage. The elimination of price controls is a step toward reducing shortages and the resultant temptation to use control over supply in times of shortage to gain unfair competitive advantages.

Finally, you asked about the applicability of merger law to energy conglomerates. The short answer, of course, is that Section 7 of the Clayton Act is applicable to all corporations, whether conglomerate or not. Of course, the more diversified the companies, frequently the more difficult to show the probable

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[10] For example, within the past year we have filed briefs amicus curiae in support of state plaintiffs in a number of cases, including *In re Master Key Litigation*, 1973 CCH Trade Cases § 74, 680 (M.D. Conn. 1973); *In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases, Alaska* v. *Standard Oil Co. of California*, 1973 CCH Trade Cases § 74, 733 (C.A. 9, 1973), cert. denied 42 U.S.L.W. 3459, (U.S. Feb. 19, 1974); and *North Carolina* v. *Chas. Pfizer & Co., Inc.*, Civil Action No. 2287 (E.D.N.C. July 25, 1973).

lessening of competition that violates Section 7. In fact, however, the Antitrust Division has been very active in the energy area, as has the FTC. For our part, there is currently pending in the Supreme Court a case involving the acquisition of United Electric Coal Companies by General Dynamics Corporation, a consolidation involving two major coal producers.[11] The Department recently filed an action charging that various agreements between Texaco, Inc., and Coastal States Gas Producing Company violated both Section 1 of the Sherman Act and Section 7; that case was concluded by the substantial abandonment of the challenged agreements.[12]

These examples are merely illustrations of the activity of the Antitrust Division in the energy area. Of course, this activity extends beyond mergers and acquisitions. Our enforcement activity includes investigation and analysis of competitive issues involved in oil and natural gas pipelines, nuclear power, international activities, and domestic production, refining, and distribution of petroleum products.

It has become increasingly clear that the current energy shortage requires a coordinated antitrust enforcement effort. The oil industry is multinational in character, and decisions made in international markets may have substantial effects upon domestic markets. Strong relationships between the production of various sources of energy—natural gas, petroleum, fissionable materials—are also evident. For these reasons, the Antitrust Division is in the process of establishing an Energy Unit, charged with the investigation of possible antitrust violations in the energy industry, conducting grand jury proceedings and preparing and trying antitrust cases. The work of the Unit will be related solely to energy concerns, specifically those arising from the current energy shortage.

I hope this somewhat lengthy statement is responsive to your invitation, and I stand ready to answer any questions you might wish to ask.

MAY 15, 1975.

Hon. THOMAS E. KAUPER,
Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Washington, D.C.

DEAR MR. KAUPER: In addition to the documents and responses to questions to be submitted for the record as requested at the May 7 hearing on the Antitrust Improvements Act of 1975 (S. 1284), it would be useful for the Subcommittee to receive the following information for the record.

1. On page 52 of the transcript, we discussed whether the position of the Department of Justice on S. 1284 represents the views of the Administration. For your information, I am enclosing a copy of a recent letter from L. William Seidman declining to appear before the Subcommittee. It would be helpful to the Subcommittee if the Department continued to pursue the OMB clearance process so that the Subcommittee could be informed as to the Administration's position on S. 1284.

2. With respect to the premerger stay provision of Title V, it would be helpful if you could elaborate on the judicial standards required to enjoin a merger before it takes place, and any cases construing those standards. It also would be useful for you to identify the cases in which the Department sought to enjoin consummation of a proposed merger and indicate the result. Finally, it would be helpful for the record to include a table identifying each Section 7 case filed by the Department, specifying the date such case was filed, the date final judgment was entered, the result, and the date of final divestiture.

3. On page 32, you suggest a more balanced approach to the automatic stay provisions if the Government seeks to prevent a merger. What type of "irreparable harm" do you envision as qualifying under the standard you propose?

4. On page 45, you state that passage of Title VI would "have an adverse impact on the Department's enforcement program." To assist the Subcommittee in evaluating that conclusion, it would be helpful if the following information were

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[11] *United States* v. *General Dynamics Corp.*, No. 72–402 (argued December 5, 1973).
[12] *U.S.* v. *Texaco, Inc.*, 73 Civ. 2608 (S.D.N.Y., final judgment entered January 25, 1974).

added to the information contained in your December 17, 1974, letter to me respecting the criminal cases filed by the Department:

(a) type of case (e.g., price fixing, monopolization, etc.);

(b) date of indictment;

(c) date trial commenced;

(d) date of district court judgment; and

(e) if the court rejected a plea of nolo contendere, did the defendant then plead guilty or not guilty?

5. Section 703 is derived essentially from Section 282(d) of the Administration's patent bill twice introduced by Senator Scott. The Department and OMB argued strongly to the Subcommittee on Patents, Trademarks, and Copyrights for the inclusion of that provision in last year's Administration patent bill (S. 2504), and the Subcommittee included it over the objections of a number of foreign companies and embassies. The Administration advised that the provision was necessary in light of the action taken by Beechem and the British Government.

(a) Please elaborate on the actions taken by Beechem and the British Government; the time involved; and all court orders and decisions relating thereto.

(b) Please provide for the record all instances of litigation respecting the production of documents to the Department by foreign companies in antitrust or patent cases.

6. In Appendix A, Item 1, you suggest that the language, "including any body acting or purporting to act under color or authority of state law" should be deleted "as surplusage since it is not necessary."

(a) Apart from the problem of what harm is done by leaving it in the statute, if it is merely surplusage, wouldn't it be useful to have this authority explicitly in the statute as the Division increases its investigation of anticompetitive practices under the guise of State action?

(b) It would be helpful to provide for the record the instances in which the Department sought to investigate practices, which, arguably, were protected in the State action concept, and the ability to obtain documents under the Antitrust Civil Process Act.

Your prompt response will be appreciated, as it is our present intention to send the May 7 and 8 hearing record and supplemental material to the printer on May 26, 1975.

Sincerely,

PHILIP A. HART, *Chairman.*

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

July 7, 1975

Honorable Philip A. Hart
United States Senate
Washington, D.C. 20510

Dear Senator Hart:

This is in response to your letter of May 15, 1975, asking for responses to several questions dealing with my testimony before your subcommittee on the Antitrust Improvements Act of 1975 (S. 1284).

For sake of clarity, I will respond to each of your questions seriatim.

1. I am authorized to state that the views expressed in this letter, as well as the views contained in my testimony of May 7 as clarified and expanded by this letter, represent the views of the Administration.

2. In order to obtain a preliminary injunction barring consummation of a merger or acquisition transaction pending the outcome of a suit instituted by the Government challenging the transaction under the antitrust laws, the Government must demonstrate only a "reasonable probability" that it will prevail on the merits. See United States v. Atlantic Richfield Co., 297 F. Supp. 1061 (S.D.N.Y. 1969); United States v. Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa. 1962), aff'd, 320 F.2d 509 (C.A. 3. 1963); United States v. Crocker-Anglo National Bank, 223 F. Supp. 849 (N.D. Calif. 1963); United States v. Chrysler Corp., 232 F. Supp. 651 (D.N.J. 1964). No separate showing of "irreparable injury" is required, as such is embodied in the policy of the antitrust laws, see, e.g., United v. Ingersoll-Rand Co., supra, 218 F. Supp. at 544. In Ingersoll-Rand, the District Court pointed out that it was not "necessary [for the Government] to demonstrate the precise manner in which violation of the law will result in injury to the public interest. It is sufficient to show only that an act or threatened act is within the declared prohibition of Congress," 218 F. Supp. at 545. However, despite this generally accepted rule, preliminary relief has been denied where a company involved in the transaction was in a severely weakened financial condition, see United States v. G. Heileman Brewing Co., 345 F. Supp. 117 (E.D. Mich. 1972), and where economic factors might make consummation at a later date impossible, see United States v. Brown Shoe Co., 1956 Trade Cas. ¶ 68244 (E.D. Mo. 1956).

Nonetheless, the essential burden of the Government to obtain preliminary relief is to demonstrate the probability of success on the merits. In a sense, the "probability" standard for preliminary relief is compounded, since the Government's ultimate burden in a Clayton Act §7 case is to show a reasonable "probability" of a substantial lessening of competition, see United States v. Marine Bancorporation, 94 S. Ct. 2856, 2870 (1974). Thus, as a logical matter, preliminary relief should not be difficult to obtain. In practice, it has frequently been necessary to convince the trial court of the ultimate merits of the case. The material requested is attached as Appendix A.[1]

3. There may well be situations in which a stay of a proposed transaction would appear appropriate or desirable at the time of suit, but where changed conditions make reevaluation of that conclusion necessary at some time prior to the completion of the litigation process. It is obviously difficult to delineate all possible factual circumstances which might compel this conclusion, but the most obvious would be where emergency financial circumstances made continued separate operation difficult or perhaps impassable. Assuming that the stay would be automatically imposed, either upon the initiation of a legal challenge or a request from the Department, and assuming further that circumstances could arise in which the Department and the defendants might differ on the appropriateness of a continued injunction, some discretion in the court seems desirable, although this discretion must be limited in order to assure the effectiveness of the procedure.

There are, obviously, a number of ways to deal with this issue. One alternative is language similar to that contained in the Bank Merger Act (12 U.S.C. §18), which on its face leaves the district court with broad discretion to lift the stay automatically imposed when a proposed bank merger is challenged by the government. Judicial interpretation has sharply circumscribed this apparent discretion, however, and controlling decisions appear to require a court to find that the challenge is "frivolous" before a stay may be lifted.

Another alternative, which we prefer, would be to include within the statute language which would leave limited discretion in the district court, in words which are broad enough to cover any possible circumstances which could appropriately call for lifting of the stay and yet narrow enough so that the stay could not be lifted without an appropriate showing. The following language, added at the end of new Section 23(d) of Title V of S. 1284, would seem to meet this description:

[1] Editor's note.—For Appendix A see page 1006.

> Such order staying the consummation of the acquisition shall remain in force during the pendency of litigation and any appeals which might be taken, unless the court shall otherwise specifically order. Such an order shall be modified only upon a showing either of irreparable harm resulting from the continuation of the order, in which case the order shall be modified only to the extent necessary to deal with the harm resulting from the total prohibition against consummation, or that the government challenge to the acquisition is wholly without merit and frivolous. A showing of loss of anticipated benefits arising from the challenged acquisition itself shall not be sufficient to meet the standards set forth in this section.

There may well be alternative language formulations which would accomplish the desired result, and my staff stands ready to work with the subcommittee staff on this and other issues.

4. The information requested is attached as Appendix "B,"[2] with the exception of that sought in part (e) of Question 4, which we were unable to compile.

5. The information is attached as Appendix "C."[3]

6. (a) We believe that the authority which this language seeks to establish is already available under the Antitrust Civil Process Act. Our interpretation is not, however, clearly established by judicial decision. In fact, we are now in litigation in one situation involving a Civil Investigative Demand ("CID") issued to the Texas State Board of Public Accountancy. The Board is a regulatory agency which has issued rules of professional conduct which may restrain competition in the sale of accounting services. The investigation which prompted the issuance of the CID was focused on the Board and its actions, including the issuance of rules and regulations.

The Board sought to have the CID set aside, arguing that as a state agency it was immune from the Sherman Act and, therefore, not subject to a CID. The district court granted the Board's petition, holding that if the Board was exempt from the Sherman Act, which the Court believed was the case, it could not be a "person under investigation" within the meaning of the Civil Process Act. The Department is now considering whether to appeal the district court's decision, and in all

[2] Editor's note.—For Appendix B see page 1111.

[3] Editor's note.—For Appendix C see page 1315.

likelihood it will do so.

Should this decision become the law, there would be a need for new statutory authority, since it is obvious that state regulatory agencies can take actions which are not immune from Federal antitrust attack. See the recent Supreme Court decision in Goldfarb v. Virginia State Bar. And, in fact, a decision as to whether particular actions of a particular agency are within the scope of the Sherman Act cannot be made without a thorough evaluation of all the facts surrounding those actions, including the question of whether those actions are properly within the grant of authority to that agency or are otherwise commanded by the state itself in its sovereign capacity. See Goldfarb, Slip Opinion, p. 17. Thus, a decision as to immunity cannot be made at the initial investigatory stage, and a CID otherwise proper should not be defeated by claims of potential immunity.

Should such additional authority become necessary, it is not clear that the language suggested in Section 201(h) of S. 1284 would be sufficient to accomplish its intended purpose. It is not clear that the inclusion of such language would itself defeat the rationale of the court in the Texas Accountants case, which rested on the ultimate immunity of the Board for its decision. We agree, however, that it would not be affirmatively harmful to have such language in the statute, and it could be of persuasive value in such cases as representing the intent of Congress that investigations of such agencies not be impeded because of the possibility that some actions of the agency might ultimately be held to be outside the jurisdiction of Federal antitrust statutes.

(b). It is difficult to determine which investigations in the past involved practices which "arguably" were protected from the reach of Federal antitrust law by the "State action" concept. However, as best we are able to determine, the Texas Accountants matter is the first situation where compliance with a CID has been thwarted (at least temporarily) by invocation of that concept.

Finally, let me clarify one point in my testimony of May 7 dealing with Title IV, parens patriae legislation. On page 17, I indicated that such actions should not be available for violations of the Clayton Act. I would like to reiterate that position, especially as it relates to the Robinson-Patman provisions. The Administration will submit legislation in the near future which would significantly alter Robinson-Patman, and limit its clearly undesirable effects on efficiency and competition. Robinson-Patman in its present form is anticompetitive, and clearly new legal rights based on Robinson-

Patman should be and are strongly opposed by this Administration. This rationale would also, of course, apply to the proposed expansion of jurisdiction of the Robinson-Patman provisions of the Clayton Act in Section 701, which the Administration opposes. Let me suggest, in fact, that parens patriae actions which would be authorized by S. 1284 should be affirmatively limited to violations of Sections 1, 2 and 3 of the Sherman Act. Those are the statutes which will in most cases be employed, and a clear limitation to those statutes would eliminate possible undesirable extension of the parens patriae authority.

As you will recall, in my testimony before your subcommittee, I took no position on the provisions of Title III, deferring to the Federal Trade Commission. The Administration is continuing to review the provisions of Title III, and will be prepared to state its position on those provisions in the near future.

Sincerely yours,

Thomas E. Kauper

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

Senator HART. The committee welcomes, at this time, in a different role, someone we have counseled with many times before. On the earlier occasions, he was speaking for the Department.

Now, we also welcome him as a spokesman for the American Bar Association, Walker B. Comegys.

STATEMENT OF WALKER B. COMEGYS, MEMBER OF THE COUNCIL OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. COMEGYS. Thank you very much, Mr. Chairman.

I appreciate the opportunity to testify here today concerning title IV of S. 1284 "a bill, to improve and facilitate the expeditious and effective enforcement of the antitrust laws."

On April 7, 1975, the Board of Governors of the American Bar Association adopted a recommendation, attached to my statement, presented by the American Bar Association section of antitrust law concerning H.R. 38 and similar legislation. Title IV, parens patriae, of S. 1284 contains provisions similar to a number of provisions of H.R. 38 to which the association is opposed.

In our view, while title IV of S. 1284 attempts to meet certain objections raised to H.R. 38, in fact, the changes made do not adequately respond to those objections.

One of the several resolutions of the antitrust section which was adopted by the board of governors reads as follows:

> * * * Be it further
>
> *Resolved,* That the American Bar Association endorses the philosophy of devising a means whereby damages can be recovered for antitrust violations which cause individually small, but widespread, consumer harm.

The second resolution adopted by the American Bar Association opposes the enactment of H.R. 38 or any similar legislation, including title IV of S. 1284, on a number of grounds, which I will hereinafter discuss.

The first point I would make is that fundamental distinction between the two bills which lies in the class to be represented by the State attorney general, or the Attorney General of the United States.

Whereas, H.R. 38 speaks in terms of parens patriae actions being brought on behalf of citizens (which, presumably, refers to consumers who might be injured by relatively small, but widespread damages), S. 1284 speaks in terms of parens patriae actions by State attorneys general and the Attorney General of the United States on behalf of persons.

As we all know, Mr. Chairman, the term "person" under the antitrust laws has been construed to include not only individuals but corporations, partnerships, States, and virtually any other entity other than the United States itself. This change in language would greatly expand the scope of the coverage of title IV of S. 1284 and, therefore, would magnify the American Bar Association's objections, hereinafter expressed. As I have noted, S. 1284 uses the word person instead of the word citizen throughout title IV.

The American Bar Association agrees wholeheartedly with the redress of individually small, but widespread, consumer claims. It is important that a workable vehicle should be devised whereby damages can be recovered for such consumers.

Senator HART. Mr. Comegys, before you go on here, let me see if, at this point, we can clarify the extent to which the American Bar, and ourselves would be in agreement. Is it fair to say that the American Bar Association supports title IV, or similar legislation, to the extent that it enables the State attorney general to sue—and I am quoting from 4(c)(1)—as a representative of a class, or classes, consisting of—and substitute "citizen" for "person"—residing in that State who has been damaged?

Mr. COMEGYS. Yes, sir.

Senator HART. In other words, would it be ABA supports that which would permit the State attorney general to proceed in a situation like *California* v. *Frito Lay*?

Mr. COMEGYS. Yes, Mr. Chairman. On the assumption that that portion of the section would incorporate the safeguards of rule 23, the class action rule.

Senator HART. You may go on.

Mr. COMEGYS. And we would go one step further, as long as the Chair has asked the question at this point. We would not require that the State attorney general, or the State, be similarly injured, which I think is the present requirement under rule 23. I appreciate the opportunity of your giving me that very succinct statement of our position.

The American Bar Association agrees wholeheartedly with the redress of individually small, but widespread, consumer claims. It is important that a workable vehicle should be devised whereby damages can be recovered for such consumers; otherwise, those who engage in antitrust violations which have the most direct consumer impact stand the best chances of retaining their ill-gotten gains.

Antitrust suits instituted by a State attorney general for damages on behalf of the consumer citizens of the State could, in fact, be such a vehicle. Unfortunately, the present form of S. 1284 and H.R. 38 goes way beyond what is necessary for proper antitrust enforcement and consumer protection. Not only would S. 1284 authorize the States to bring damage actions for "persons" as opposed to consumers under the antitrust laws, but it would do so in three separate forms which, embody concepts that would deprive both plaintiffs and defendants of essential rights.

We believe that a very simple and straightforward bill providing for representative consumer actions by the States under rule 23 of the Federal Rules of Civil Procedure would fully accomplish the goals of the legislation, while avoiding the hopeless morass of problems which will necessarily be created by title IV of S. 1284 and H.R. 38 in their present form.

Proposed section 4C(a)(1) would create two techniques for civil actions brought by a State attorney general to recover damages personally sustained by persons. First, the State attorney general could sue as parens patriae, with the requirements of Federal rule 23 not applying to the suit.

The provisions of title IV of S. 1284 4C(b) (1) and (2) do not provide the protections afforded by rule 23. The notice provisions of section 4C(b)(1) merely require publication. While courts, under rule 23, have sometimes ordered that notice be given by publication under extreme circumstances, those courts have universally recognized that, notice

by publication is the least effective method of notifying putative members of a class; and, universally, courts have required personal notification of members of a class under rule 23, at least to the extent that they can be identified.

The inadequacy of notice by publication is particularly acute where the class of persons to be represented is consumers. It is not unreasonable to assume that many sophisticated executives of corporations involved in substantial antitrust or securities class actions might read notices published in newspapers such as The Wall Street Journal. However, it is highly doubtful that the majority of consumers suffering small individual claims would read the publication in the chosen instrument prescribed by section 4C(b)(1).

Under rule 23, adequate notice of the pendency of a class action must be given to all persons claimed to be represented, each of whom then has the opportunity to "opt out" or remain in the lawsuit, and thereby be bound by the judgment, whether favorable or unfavorable. These two safeguards contained in rule 23 are constitutional in dimension and cannot lightly be disregarded.

The right to "opt out" provided by section 4C(b)(2) appears to be illusory. The right to "opt out" is certainly unavailable to those members of the class who do not read the chosen instrument. Moreover, it is apparent that other vital protective mechanisms of rule 23 are ignored by this bill; namely, numerosity, commonality, typicality, and preferment of the class action method to other methods of litigation are all questions of law under rule 23, which the court must evaluate before it determines a class action. These requirements are totally ignored by S. 1284.

Alternatively, the court could determine under section 4C(a)(1), in its discretion, that the interests of justice require that the State attorney general act as a representative member of a class of such persons, in an action subject to the requirements of Federal rule 23. We endorse this class suit concept as to consumers, but we respectfully submit that the parens patriae form of action in section 4C(a)(1) should be eliminated.

Neither type of parens patriae suit under sections 4C(a) (1) and (2) is permitted under present law. See *Hawaii* v. *Standard Oil Co.*[1], and *California* v. *Frito-Lay, Inc.*[2]

By amending the law so as to provide that a State attorney general is an appropriate and adequate representative of consumer interests within the State—whether or not the State itself has also been injured in its proprietary capacity—but otherwise requiring that such suits be subject to the requirements of Federal rule 23, multiple benefits could be obtained.

First, it could be anticipated that frivolous or insignificant suits will not be instituted, because the class action would be brought by a State agency acting solely in the public interest.

Second, the safeguards—both constitutional and otherwise—which are contained in rule 23, and which benefit both plaintiffs and defendants alike, would be maintained.

Finally, the problems of manageability which have created such judicial difficulties in private class actions for antitrust damages would in large measure be avoided; for the State would have available

[1] 405 U.S. 251 (1972).
[2] 474 F.2d 774 (9th Cir. 1973).

to it sufficient techniques to provide the essential notices to class members as well as the funds necessary to do so.

Accordingly, while the antitrust section warmly endorses the attorney general class action alternative as a far-reaching step forward in antitrust enforcement for the protection of the consumer, the parens patriae suit provided for in proposed section 4C(a)(1) should be deleted.

Section 4C(c) of the bill was evidently drafted in recognition of the fact that representative actions, especially those in which large numbers of consumers are being represented, can contain serious problems of manageability in connection with the proof and distribution of damages. The alchemy by which S. 1284 would seek to change what may be unmanageable into a manageable suit is the authorization of damages in gross, dispensing with the requirement of separate proof of individual damages. Additionally, aggregate damages would be determined on the basis of statistical sampling methods, the pro rata allocation of excess profits to sales occurring within the State, or some other system, as permitted by the court.

Actually, the solution suggested by this provision would not really solve the manageability problems that can arise in massive class actions. First, if citizens of the State will be permitted to opt out of the action instituted by the attorney general—as they should be—damages cannot be computed in gross without first subtracting from the total the amount of damages due to those citizens who have opted out. If a significant number are involved, this can become a substantial task. Indeed, it may be virtually impossible, because those persons whose damages would have to be subtracted would not be present in court to assist in determining their damages.

But more importantly, it should not be assumed that antitrust damages are readily capable of being computed in gross. On the contrary, the general situation will require the individual computation of damages, because statistical sampling techniques or pro rata allocations of excess profits will be impossible to determine. For example, it cannot be assumed that competitors engaged in a price-fixing conspiracy will sell at uniform prices, or will retain identical prices throughout the conspiracy time period. Such situations will not submit to damage computations in gross but, rather, will require individual damage determinations.

Additionally, all citizens for the benefit of whom a State institutes an antitrust damage suit should be afforded the opportunity to claim their share of the damages on an individual basis. Such individual determinations will, obviously, also require considerable time.

While the concept of aggregating damages without separately proving individual claims will not in fact resolve the manageability problems of large class actions for damages, it would create serious issues of constitutional dimension. Due process requires that a defendant be afforded the right to dispute each and every claim made against it, a right that would be denied by section 4C(c)(1). Moreover, the seventh amendment guarantees a defendant the right to a jury trial for all actions for damages in excess of $20, and this right comprehends both the liability and damage stages of a trial.

At a minimum, before Congress adopts any concept of damages in gross under the antitrust laws, the courts should be given further

opportunity to consider available techniques to handle damages in massive class actions.

We do recognize, however, the legitimate interests of this committee in seeing to it that antitrust wrongdoers are deprived of their profits obtained as a result of illegal acts. But should further consideration be given to the theory contained in section 4C(c)(1), extreme care is essential to avoid undue punishment under the antitrust laws that already provide for treble damages as a deterrent to violations, and have just been amended to raise substantially the civil and criminal penalties which may be assessed against defendants.

Finally, section 4C(c)(2) provides for escheat of damages or use for general welfare purposes to the extent that such damages are not claimed by any injured person. This attempt to codify the so-called "pot of gold" theory of damages is inconsistent with the statutory scheme because it is noncompensatory and punitive.

No court has ever held on the merits that the "fluid relief" or "pot of gold" theories were permissible. The "pot of gold" theory has been agreed to by defendants in settlement cases, but rejected as inappropriate when opposed by a defendant.

Subsection 4C(a)(2) provides for the third type of antitrust action that could be brought by the State attorney general under S. 1284. Under this provision, the State could sue, as parens patriae, for damages "to the general economy of that State or any political subdivision thereof."

This provision is intended to overrule the Supreme Court decision in *Hawaii* v. *Standard Oil Co.*, in which the Supreme Court held that injury to a State's "general economy" does not qualify as injury to its "business or property," as required by section 4 of the Clayton Act.

We believe that three principal reasons militate against legislatively overruling that decision: First, duplicative recoveries could not be avoided, in spite of the bill's purported prohibition against duplicative recovery set forth in section 4C(a)(2); the latter provision is therefore internally inconsistent.

Second, even if the injury to a State's general economy could exist independently of injury suffered by its constituents, such damages would not be susceptible of computation; and, third, the injury which would be recompensed under this provision is too remote from the antitrust violation to merit judicial protection.

As recognized by the Supreme Court in *Hawaii* v. *Standard Oil Co.*,[1] which enunciated strong policy reasons against permitting such suits, there would be an inherent danger of duplicative recoveries of trebled damages if suits were permitted to recover for damages to a State's general economy. The vague concept of such damages would be virtually impossible to separate from the damages to the citizens of the State that may have been caused by the antitrust violation involved in the suit.

And I have in my prepared statement,[2] a footnote 10, which reinforces that statement.

Moreover, it is unclear what "damages to the general economy" means. The Supreme Court in *Hawaii* v. *Standard Oil Co.*, stressed that a large, but ultimately indeterminable part of such injury represents nothing more than the totality of injury to the "business or

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[1] 405 U.S. at 264.

[2] Prepared statement appears on p. 128.

property" of the State's citizens for which recovery can be obtained by a variety of means.

Thus, if the citizens were themselves to sue for damages, or if a State were to sue either in its proprietary capacity or as a representative member in a class action suit permitted under section 4C(a)(1), or as parens patriae for damages sustained by its citizens, if that concept is retained in the bill despite its deficiencies, any recovery obtained from suits for damages to the general economy of the State would necessarily be duplicative, in spite of section 4C(a)(2) of title IV.

Even if it were possible to postulate how an antitrust violation can adversely affect a State's general economy or retard its economic development in a manner independent from, or in addition to, injuries suffered to the business or property of citizens of the State, it would be extremely difficult, if not impossible, to measure accurately the amount of such independent injury. As the Supreme Court stressed in the *Hawaii* decision:

> Measurement of an injury to the general economy . . . necessarily involves an examination of the impact of a restraint of trade upon every variable that affects the State's economic health—a task extremely difficult, "in the real economic world, rather than an economist's hypothetical model." [1]

Thus, permitting such recovery would result in damage estimates more hypothetical than real, and potentially out of proportion to any actual injury inflicted. Moreover, the margin of error would be multiplied by three.

Besides the danger of duplicative recovery and the extreme difficulty of measuring any independent or additional harm, a third reason militates against allowing the form of suit provided for under proposed section 4C(a)(2). Even assuming the existence of independent or additional harm, the causal connection between an antitrust violation and the injury suffered by a State's general economy is extremely nebulous and indirect. Courts have always limited antitrust standing to those who are directly injured as a result of an antitrust violation and have denied relief for remote or indirect harm.

Let us now turn to notification of suits by the U.S. Attorney General as parens patriae for persons residing in the State. Section 4D would require the Attorney General of the United States to notify a State attorney general whenever the former has brought suit under section 4A of the Clayton Act and "has reason to believe" that a State attorney general could also sue on the same cause of action on behalf of persons of the State. If the State attorney general fails or declines to bring such an action within 90 days of notification, the Attorney General of the United States may bring a parens patriae suit in his place.

Assistant Attorney General Kauper succinctly articulated to the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, last year, the difficult judgments which this type of provision would require the Attorney General to make. First, a judgment would be required, presumably before any substantial amount of discovery has taken place in the Federal Government's pending lawsuit, as to the possible liability of the defendant to the "persons" of each of the individual, several, 50 States.

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[1] 405 U.S. at 263, n. 14, *quoting from* Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 493.

These decisions are difficult in themselves to make because of the insufficient amount of evidence at the disposal of the Federal Government at the time the decisions are presumably to be made and because of the vague standards established to guide in such determinations.

The difficulties are then compounded by the provisions authorizing the Attorney General of the United States to bring suit as parens patriae on behalf of the State or States notified in default of the State attorney general's taking action. One can imagine the pressures which might be brought to bear by some State attorneys general to cause the Attorney General of the United States to bring suit on their behalf.

It is significant that the Federal and State officials who would be intimately involved in carrying out this provision have opposed it. It has been stressed that the 90-day notification period is too short and removes the discretion of a State attorney general's need to weigh countervailing factors, that it is inappropriate and impracticable to require a public official to bring an antitrust action, that the provision would operate as a disincentive to the maintenance of strong State antitrust enforcement staffs, and that the provision would unnecessarily strain the resources of the Antitrust Division.

I think, Mr. Chairman, I have probably run out of my time. I do have a section in my prepared text, which deals with section 4E of the bill, raises objections similar to those raised to 4D, and suggests some alternative language in the event the committee decides in its wisdom to retain that section in spite of our objections.

Senator HART. Thank you very much. The point I am going to make will come as no surprise to you, I know. But it has to do with the reality of the right if, as you have indicated, the ABA's insistence that rule 23 be observed in every respect—rule 23—if that is a hard and fast position, and if Congress did that, then really we would be almost guilty of false advertising if we claimed that we have really done much for the consumer in title IV.

Now, just for the record, although we are thoroughly familiar with it, how many State attorneys general would be able to just get the money to mail the notices to—in some cases there are millions of people that I can think of—in other words 2 million members of a class that could be identified by name, and address, rule 23 says, "give the best notice you can". So that is mailing it, and the estimate in cost of mailing at first was $225,000, and then the postal rate went up, so we wound up with $315,000.

The $315,000 is a whale of a lot of meat in most budgets of State attorneys general.

Mr. COMEGYS. Yes, Mr. Chairman; that is correct. However, I think that there are two answers to that. First of all, as the chairman is well aware, there are methods whereby consumers may be protected in the future by actions brought by the FTC, by actions brought in appropriate cases, by the Justice Department, which will stop at least future shock to the consumer. And if my memory serves, indeed, in the *Frito-Lay* case, the Federal Trade Commission had done just that.

But the second, and the more important point that I should make, Mr. Chairman, has to do with the point that you are getting at; namely, the possibility, or rather the bill's provisions which would provide for notice solely by publication in some chosen instrument.

Now, the matter you referred to, *Eisen* [1] —and if I may, Mr. Chairman, I would like to read very, very briefly from that Supreme Court decision. At page 176—and the point had just been made in the Court's opinion that the chairman has just made to me in a slightly different context—the Court said:

> The short answer to these arguments is that individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is rather, an unambiguous requirement of Rule 23. As the Advisory Committee's Note explained the Rule was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit. [Citation omitted.] Accordingly, each class member who can be identified through reasonable effort must be notified that he may request exclusion from the action and thereby preserve his opportunity to press his claim separately or that he may remain in the class and perhaps participate in the management of the action. There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of the particular plaintiffs.

And earlier in the decision, Mr. Chairman, the Court stated that rule 23 equated these notice provisions to due process, and cited the *Mullane* case,[2] which I have cited in my prepared testimony. The *Mullane* case states that notice required is the best notice possible, and quite clearly where persons are identifiable, the Court has held that personal notice, even in *Eisen*, must be given.

Senator HART. I am not quarreling necessarily with the Court's interpretation of rule 23. I am just saying that your delivering to the public in terms of opportunity to recover something substantial—if we follow your recommendation, in those cases where we do not know who they are, and constructive notice is enough—but we are not going much for them if—assuming most attorneys general operate on the same budget they do in Michigan—if they are going to have to come up with hundreds of thousands of dollars just to send the mail out when they can identify the members of the class.

Mr. COMEGYS. Well, Mr. Chairman, once again I certainly never want to be in the position of arguing with the Chair, but I feel I must explain that in my opinion you have got a constitutional problem here.

Senator HART. I think you have got a constitutional debate, not necessarily a problem.

Mr. COMEGYS. Sir?

Senator HART. I think you have got a constitutional issue. Assume we get around to changing rule 23 and in a fashion that would not require actual notice, even in the instances where the individuals are identifiable, I think we have a constitutional debate, a true issue which only a court could give us the ultimate answer.

Mr. COMEGYS. That is correct, Mr. Chairman. Only the Supreme Court would be the final authority. But what I am saying is, on the basis of the Supreme Court's track record, particularly in the *Mullane* case, which is cited, and *Eisen*, one would anticipate that the notice provisions in their present form in title IV would be inadequate.

But as you quite correctly point out, as some sage said, "The law is what the courts say it is". And I certainly am not the final determiner of that constitutional question.

Senator HART. Now, let us move to a couple of other titles. And I asked these questions anticipating that you would not be able to reply

[1] Eisen v. Carlisle & Jacquelin, 417 U.S. 156 1974.
[2] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

on behalf of the American Bar, but I would welcome your opinions because of your background and standing in the antitrust field.

Title II, that is the Antitrust Civil Process Act, expanding the reach of the Antitrust Division. Are you familar with that?

Mr. COMEGYS. I am vaguely familiar with it. I have scanned it, Mr. Chairman. You are quite correct that I am not authorized to speak on behalf of any other title of the bill by the American Bar Association.

I might add for the Chair's possible interest that these other titles are presently being considered by committees of the Antitrust Section, and at some point there may be an Antitrust Section, or an American Bar Association position thereon. There is none at the present time.

Now, with respect to title II, and this is the only title that—if I might, Mr. Chairman, care to comment on in my individual capacity, I would say that I warmly, individually, endorse the concept of title II, though I have not examined the provisions in detail, and am not prepared to testify thereon, even as an individual—but I warmly endorse the concept.

Senator HART. The reason that I thought it would be helpful to have that answer on the record, was that knowing your earlier attitude on that subject, I was certain that that title would find warmness—warm support from you, as an individual.

Mr. COMEGYS. Yes, sir, as an individual.

Mr. NASH. No questions, Mr. Chairman.

Mr. CHUMBRIS. No questions thank you, Mr. Chairman.

Senator HART. Thank you very much.

Mr. COMEGYS. Thank you very much, Mr. Chairman.

[The prepared statement of Walker B. Comegys follows. Testimony resumes on p. 137.]

PREPARED STATEMENT ON BEHALF OF THE AMERICAN BAR ASSOCIATION BY WALKER B. COMEGYS, MEMBER OF THE COUNCIL OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW

Mr. Chairman, I appreciate the opportunity to testify here today concerning Title IV of S. 1284, a bill "to improve and facilitate the expeditious and effective enforcement of the antitrust laws."

I

On April 7, 1975, the Board of Governors of the American Bar Association adopted a recommendation, attached to my statement, presented by the American Bar Association Section of Antitrust Law concerning H.R. 38 and similar legislation. Title IV (*Parens Patriae*) of S. 1284 contains provisions similar to a number of provisions of H.R. 38 to which the Association is opposed.

With respect to Section 4C of Title IV, the principal differences between Title IV of S. 1284 and H.R. 38 are as follows:

First, H.R. 38 permits a State attorney general to bring actions as *parens patriae* for *citizens* residing in the State; whereas, S. 1284 permits a State attorney general to bring actions as *parens patriae* on behalf of *persons* residing in that State.

Next, Section 4C(a)(2) of S. 1284 purports to exclude from suits brought by a State attorney general as *parens patriae* for damages to the general economy of that State such damages which would be duplicative of those recovered by a State attorney general suing as *parens patriae* on behalf of persons residing in that State. This exclusion is not contained in H.R. 38; however, as I shall later point out, this purported exclusion, while express, is in practice illusory.

Next, Section 4C(b)(1) of S. 1284, unlike H.R. 38, provides for notice by publication of *parens patriae* actions brought on behalf of persons residing in the State, and Section 4C(b)(2) permits any such person to "opt out" of the State attorney general's action. Otherwise, the two bills, H.R. 38 and Title IV of S. 1284, are substantially identical insofar as they deal with *parens patriae* actions brought by State attorneys general.

With respect to those provisions of S. 1284 which relate to the Attorney General of the United States' bringing actions on behalf of States in lieu of the State attorneys general, the following principal differences appear:

First, once again, S. 1284 speaks in terms of actions on behalf of *persons;* whereas, H.R. 38 speaks of actions brought on behalf of *citizens.*

Next, while both bills require the Attorney General of the United States to notify State attorneys general whenever he has reason to believe that any State attorney general would be entitled to bring an action based upon the same cause of action brought by the United States, S. 1284 provides that, in the event of inaction by State attorneys general after 90 days of such notification, the Attorney General of the United States *may* bring an action for the State or States as *parens patriae.* On the other hand, H.R. 38 would *require* the Attorney General of the United States to bring an action on behalf of such State or States in default of the State attorneys general's taking action. Certain definitional and effective date provisions are added to S. 1284.

In our view, while Title IV of S. 1284 attempts to meet certain objections raised to H.R. 38, in fact, the changes made do not adequately respond to those objections.

II

One of the two resolutions of the Antitrust Section which was adopted by the Board of Governors reads as follows:

> Be it further resolved, That the American Bar Association endorses the philosophy of devising a means whereby damages can be recovered for antitrust violations which cause individually small, but widespread, consumer harm.

The second resolution adopted by the American Bar Association opposes the enactment of H.R. 38 or any similar legislation, including Title IV of S. 1284, on a number of grounds, which I will hereinafter discuss.

The first point I would make is that fundamental distinction between the two bills which lies in the class to be represented by the State attorney general or the Attorney General of the United States. Whereas, H.R. 38 speaks in terms of *parens patriae* actions being brought on behalf of *citizens,* (which, presumably, refers to consumers who might be injured by individually small, but widespread damages), S. 1284 speaks in terms of *parens patriae* actions by State attorneys general and the Attorney General of the United States on behalf of *persons.* As we all know, Mr. Chairman, the term "person" under the antitrust laws has been construed to include not only individuals but corporations, partnerships, States, and virtually any other entity other than the United States itself. This change in language would greatly expand the scope of the coverage of Title IV of S. 1284 and, therefore, would magnify the American Bar Association's objections hereinafter expressed. As I have noted, S. 1284 uses the word *person* instead of the word *citizen* throughout Title IV.

The American Bar Association agrees wholeheartedly with the redress of individually small, but widespread, consumer claims. It is important that a workable vehicle should be devised whereby damages can be recovered for such consumers; otherwise, those who engage in antitrust violations which have the most direct consumer impact stand the best chances of retaining their ill-gotten gains.

Some have contended that Rule 23 of the Federal Rules of Civil Procedure, as amended in 1966, promised the possibility of such relief to consumers in the form of private class actions for damages. However, the recent Supreme Court *Eisen* [1] decision demonstrated that such suits may generally not be maintainable because of the requirement that members of the class must be notified—at the plaintiffs' cost—of their right to exclude themselves from the action or to enter an appearance through counsel, and of the fact that the judgment will bind all class members not requesting exclusion—whether favorable or not. Additionally, the justifiability of private class actions has been the subject of serious concern by members of both Bench and Bar, because the suits are instituted by private parties who may be more interested in the size and ability of the defendant to submit to large damage settlements rather than the nature of the violation or protection of the public interest.

Accordingly, other alternatives must be sought out, and should be pursued if they in fact promise the actual recovery of damages to consumers injured by antitrust violations while retaining the right of a defendant to a fair hearing with

[1] Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

all constitutional safeguards, as well as the likelihood that suits will be instituted only when they are truly in the public interest.

Antitrust suits instituted by a State attorney general for damages on behalf of the consumer citizens of the State could, in fact, be such an alternative. Unfortunately, the present form of S. 1284 and H.R. 38 goes way beyond what is necessary for proper antitrust enforcement and consumer protection. Not only would S. 1284 authorize the States to bring damage actions for "persons" as opposed to consumers under the antitrust laws, but it would do so in three separate forms, which embody concepts that would deprive both plaintiffs and defendants of essential rights.

We believe that a very simple and straightforward bill providing for representative actions by the States under Rule 23 of the Federal Rules of Civil Procedure would fully accomplish the goals of the legislation, while avoiding the hopeless morass of problems which will necessarily be created by Title IV of S. 1284 and H.R. 38 in their present form.

1. Suits for Damages Personally Sustained by Persons of the State Under Title IV

Proposed Section 4C(a)(1) would create two techniques for civil actions brought by a State attorney general to recover damages personally sustained by persons. First, the State attorney general could sue as *parens patriae*, with the requirements of Federal Rule 23 not applying to the suit.

The provisions of Title IV of S. 1284 4C(b) (1) and (2) do not provide the protections afforded by Rule 23. The notice provisions of Section 4C(b)(1) merely require publication. While courts under Rule 23 have sometimes ordered that notice be given by publication under extreme circumstances, those courts have universally recognized that notice by publication is the least effective method of notifying putative members of a class; and, universally, courts have required personal notification of members of a class under Rule 23, at least to the extent that they can be identified; and the Supreme Court has declared that ". . . the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit."[2]

The inadequacy of notice by publication is particularly acute where the class of persons to be represented is consumers. It is not unreasonable to assume that many sophisticated executives of corporations involved in substantial antitrust or securities class actions might read notices published in newspapers such as *The Wall Street Journal*. However, it is highly doubtful that the majority of consumers suffering small individual claims would read the publication in the chosen instrument prescribed by Section 4C(b)(1).

Under Rule 23, adequate notice of the pendency of a class action must be given to all persons claimed to be represented, each of whom then has the opportunity to "opt out" or remain in the lawsuit, and thereby be bounded by the judgment, whether favorable or unfavorable. These two safeguards contained in Rule 23 are constitutional in dimension and cannot be lightly disregarded.[3]

The scheme of adequate notice and the opportunity to decline or accept representation are related concepts grounded in considerations of due process. Any individual citizen should have the right—assured by Federal Rule 23—to decline representation by a State attorney general. Certainly, an individual should be afforded the opportunity of deciding whether the State attorney general is an adequate representative. It may well be that in particular instances a State attorney general may not prosecute a case diligently or may settle the case for less than the individual believes could have been obtained in a separate suit. Additionally, certain individuals may not want to have claims pressed on their behalf. They may not feel aggrieved, or they may have contacts with the defendant that would make representation inappropriate. Because of the defective notice provisions embodied in S. 1284, it is submitted that the vast majority of citizens affected would not be appraised of the filing of the action and that, therefore, their opportunity to "opt out" becomes a nullity.

In addition, basic fairness to the defendant requires that persons who do not choose to remove themselves from a State attorney general's antitrust suit should be bound by the result of the suit, whether it is favorable or unfavorable. Since there is a substantial question of constitutionality of the notice provisions of Section 4C(b), there is no assurance that the defendant will not be subjected to subsequent suits by citizens whose claims were supposedly adjudicated by the

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[2] *Id.* at 179; see also *In re* Hotel Telephone Charges, 500 F. 2d 86 (9th Cir. 1974).

[3] See Eisen v. Carlisle & Jacquelin, *supra;* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

parens patriae suit (under Section 4C(a)(1). It is unfair to allow multiple suits against the same defendant on the same claims. If this requirement of Rule 23 is eliminated in suits on behalf of classes of consumers—as, arguably, it would be by the *parens patriae* suit permitted under Section 4C(a)(1)—one of the prime benefits of representative actions would be lost, *i.e.*, the saving of judicial time and expense by disposing of numerous claims in one suit.

The right to "opt out" provided by Section 4C(b)(2) appears to be illusory. The right to "opt out" is certainly unavailable to those members of the class who do not read the chosen instrument. Moreover, it is apparent that other vital protective mechanisms of Rule 23 are ignored by this bill; *vis.*, numerosity, commonality, typicality, and preferment of the class action method to other methods of litigation are all questions of law under Rule 23, which the court must evaluate before it determines a class action. These requirements are totally ignored by S. 1284.

Alternatively, the court could determine under Section 4C(a)(1), in its discretion, that the interests of justice require that the State attorney general act as a representative member of a class of such persons, in an action subject to the requirements of Federal Rule 23. We endorse this class suit concept as to consumers, but we respectfully submit that the *parens patriae* form of action in Section 4C(a)(1) should be eliminated.

Neither type of *parens patriae* suit under Sections 4C(a)(1) and (2) is permitted under present law. See *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972) (injury to general economy) and *California* v. *Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973).

In *California* v. *Frito-Lay, Inc.*, the court rejected the concept of a *parens patriae* suit for the damages sustained by citizens of a State; and a State may not bring a class action on behalf of its citizens for damages they have sustained, unless the State itself has also suffered the same kind of damages, for example, when it has purchased in its proprietary capacity the merchandise that has been sold to the consumer class members as part of an antitrust violation.[4]

By amending the law so as to provide that a State attorney general is an appropriate and adequate representative of consumer interests within the State—whether or not the State itself has also been injured in its proprietary capacity—but otherwise requiring that such suits be subject to the requirements of Federal Rule 23, multiple benefits could be obtained. First, it could be anticipated that frivolous or insignificant suits will not be instituted, because the class action would be brought by a State agency acting solely in the public interest. Second, the safeguards—both constitutional and otherwise—which are contained in Rule 23, and which benefit both plaintiffs and defendants alike, would be maintained. Finally, the problems of manageability which have created such judicial difficulties in private class actions for antitrust damages would in large measure be avoided; for the State would have available to it sufficient techniques to provide the essential notices to class members as well as the funds necessary to do so.[5]

Finally, it would appear that the only technique by which duplicate recoveries of already trebled damages could be avoided if the *parens patriae* approach is adopted (see discussion *infra*, II.3), would be the prohibition of all other actions by consumer citizens assertedly represented by the State attorney general in the *parens patriae* suit. The State attorney general's suit would have to be the exclusive means by which a consumer could achieve redress for the damages claimed in the *parens patriae* suit. Certainly, this alternative is clearly inferior to the Rule 23 solution we would endorse. The rights of individuals to seek redress in the form they wish, or not to seek redress at all, should not be disregarded. Otherwise, serious due process considerations would arise, particularly when the private suit has been filed prior to the State attorney general's *parens patriae* action.

Accordingly, while the Antitrust Section warmly endorses the attorney general class action alternative as a far-reaching step forward in antitrust enforcement for the protection of the consumer, the *parens patriae* suit provided for in proposed Section 4C(a)(1) should be deleted.

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[4] *Compare In re* Ampicillin Antitrust Litigation, 55 F.R.D. 269 (D.D.C. 1972), *aff'd sub nom*, Illinois v. Bristol-Myers Co., 470 F. 2d 1276 (D.C. Cir. 1972), *with* Kauffman v. Dreyfus Fund, Inc., 434 F. 2d 727 (3d Cir. 1970); Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26 (S.D.N.Y. 1972).

[5] Obviously, such suits should be permitted only in those circumstances when the individuals represented by the State attorney general could have maintained actions on their own behalves. We do not construe this bill as attempting to overturn the rule established in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), and its progeny.

2. Aggregation and Distribution of Damages

Section 4C(c) of the bill was evidently drafted in recognition of the fact that representative actions, especially those in which large numbers of consumers are being represented, can contain serious problems of manageability in connection with the proof and distribution of damages. The alchemy by which S. 1284 would seek to change what may be unmanageable into a manageable suit is the authorization of damages in gross, dispensing with the requirement of separate proof of individual damages. Additionally, aggregate damages would be determined on the basis of statistical sampling methods, the pro rata allocation of excess profits to sales occurring within that State, or some other system, as permitted by the court.

Actually, the solution suggested by this provision would not really solve the manageability problems that can arise in massive class actions. First, if citizens of the State will be permitted to opt out of the action instituted by the attorney general—as they should be—damages cannot be computed in gross without first subtracting from the total the amount of damages due to those citizens who have opted out. If a significant number are involved, this can become a substantial task. Indeed, it may be virtually impossible, because those persons whose damages would have to be subtracted would not be present in court to assist in determining their damages.

But more importantly, it should not be assumed that antitrust damages are readily capable of being computed in gross. On the contrary, the general situation will require the individual computation of damages, because statistical sampling techniques or pro rata allocations of excess profits will be impossible to determine. For example, it cannot be assumed that competitors engaged in a price-fixing conspiracy will sell at uniform prices, or will retain identical prices throughout the conspiracy time period. Such situations will not submit to damage computations in gross but, rather, will require individual damage determinations.[6]

Additionally, all citizens for the benefit of whom a State institutes an antitrust damage suit should be afforded the opportunity to claim their share of the damages on an individual basis. Such individual determinations will obviously also require considerable time.

Those few situations which do permit of uniform methods of damage computations, for example, when competitors agree to raise their prices in identical amounts and retain that price increase during the entire damage period,[7] do not require the aggregate damage provision of proposed Section 4C(c)(1) to be manageable. Such suits are readily manageable under Rule 23 as it presently stands. Individual damage hearings in such situations need not be protracted, and can be conducted by a Master who need merely multiply the overcharge by the number of units purchased.

But while the concept of aggregating damages without separately proving individual claims will not in fact resolve the manageability problems of large class actions for damages, it would create serious issues of constitutional dimension. Due process requires that a defendant be afforded the right to dispute each and every claim made against it—a right that would be denied by Section 4C(c)(1). Moreover, the Seventh Amendment guarantees a defendant the right to a jury trial for all actions for damages in excess of $20, and this right comprehends both the liability and damage stages of a trial.[8]

At a minimum, before Congress adopts any concept of damages in gross under the antitrust laws, the courts should be given further opportunity to consider available techniques to handle damages in massive class actions. The Supreme Court has yet to rule definitively on the question, and few class actions have been tried since Rule 23 was amended in 1966. The fate of antitrust cases should not be lightly turned over to the statistician through the establishment of a blanket rule that would place the rights of a defendant—including at times its very continued existence—in jeopardy by permitting pure speculation in the determination of damages through the whims of a jury.

We do recognize, however, the legitimate interests of this Committee in seeing to it that antitrust wrongdoers are deprived of their profits obtained as a result of illegal acts. But should further consideration be given to the theory contained in Section 4C(c)(1), extreme care is essential to avoid undue punishment under the antitrust laws that already provide for treble damages as a deterrent to

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[6] See, *e.g.*, *Nationall Auto Brokers Corp.* v. *General Motors Corp.*, 376 F. Supp. 620, 634–35 (S.D.N.Y. 1974); *Bogosian* v. *Gulf Oil Corp.*, 62 F.R.D. 124, 138–39 (E.D. Pa. 1973); *Yanai* v. *Frito Lay, Inc.*, 61 F.R.D. 349 (N.D. Ohio 1973).

[7] See *Eisen* v. *Carlisle & Jacquelin*, *supra*.

[8] See *Colgrove* v. *Battin*, 413 U.S. 149, 161 (1973).

violations, and have just been amended to raise substantially the civil and criminal penalties which may be assessed against defendants. Thus, if this Committee determines to retain the concept of aggregate damage awards: (1) such relief should be carefully limited to class actions instituted by State attorneys general, for private plaintiffs do not act in the public interest; (2) aggregate recoveries should be authorized only in attorney general suits involving horizontal price fixing and other "hard core" antitrust violations; (3) aggregate relief should be permitted only when the court has determined that widespread consumer damages have been caused throughout the State as a result of the violations; and (4) it should be provided that damages awarded in gross may not be trebled, for although treble damages have a legitimate place in individual damage suits to encourage private suitors to bring suit and to deter those who would violate the antitrust laws, the encouragement of private actions is not a factor in a class action instituted by the State attorney general.

Finally, Section 4C(c)(2) provides for escheat of damages or use for general welfare purposes to the extent that such damages are not claimed by any injured person. This attempt to codify the so-called "pot of gold" theory of damages is inconsistent with the statutory scheme because it is noncompensatory and punitive. No court has ever held on the merits that the "fluid relief" or the "pot of gold" theories were permissible. The "pot of gold" theory has been agreed to by defendants in settlement cases, see *West Virginia v. Chas. Pfizer & Co.*, 314 F.Supp. 710 (S.D.N.Y. 1970), *aff'd* 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971), but rejected as inappropriate when opposed by a defendant. *Eisen v., Carlisle & Jacquelin*, 479 F. 2d 1005, 1013 (2d Cir. 1973), *aff'd on other grounds*, 417 U.S. 156 (1974).

3. Suits to Recover Damages to the General Economy of the State

Subsection 4C(a)(2) provides for the third type of antitrust action that could be brought by the State attorney general under S. 1284. Under this provision, the State could sue, as *parens patriae*, for damages "to the general economy of that State or any political subdivision thereof." This provision is intended to overrule the Supreme Court decision in *Hawaii v. Standard Oil Co.*,[9] in which the Supreme Court held that injury to a State's "general economy" does not qualify as injury to its "business or property," as required by Section 4 of the Clayton Act. We believe that three principal reasons militate against legislatively overruling that decision: (1) duplicative recoveries could not be avoided, in spite of the bill's purported prohibition against duplicative recovery set forth in Section 4C(a)(2); the latter provision is therefore internally inconsistent;[10] (2) even if injury to a State's general economy could exist independently of injury suffered by its constituents, such damages would not be susceptible of computation; and (3) the injury which would be recompensed under this provision is too remote from the antitrust violation to merit judicial protection.

As recognized by the Supreme Court in *Hawaii v. Standard Oil Co.*, which enunciated strong policy reasons against permitting such suits, there would be an inherent danger of duplicative recoveries of trebled damages if suits were permitted to recover for damages to a State's general economy. The vague concept of such damages would be virtually impossible to separate from the damages to the citizens of the State that may have been caused by the antitrust violation involved in the suit.

It is unclear what "damages to the general economy" means. The Court of Appeals in *Hawaii v. Standard Oil Co.*, 431 F. 2d 1282, 1285 (9th Cir. 1970), stated:

> The general economy is an abstraction. It has no value in itself, save as it may (in a representational capacity on behalf of business and property generally) serve to confer value on the specific items of business or property it affects. It exists only as a reflection of the business or property values it represents.

In affirming the judgment of the Court of Appeals, the Supreme Court stressed that a large, but ultimately indeterminable part of such injury represents nothing more than the totality of injury to the "business or property" of the State's citizens, for which recovery can be obtained by a variety of means.

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[9] 405 U.S. 251 (1972).

[10] In *Hawaii*, the Court found this problem precluded the State's action:

"A large and ultimately indeterminable part of the injury to the "general economy," as it is measured by economists, is no more than a reflection of injuries to the "business or property" of consumers, for which they may recover themselves under §4. Even the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State." *Id.* at 264.

Thus, if citizens were themselves to sue for damages, or if a State were to sue either in its proprietary capacity or as a representative member in a class action suit permitted under Section 4C(a)(1),[11] any recovery obtained from suits for damages to the general economy of the State would necessarily be duplicative.

Recovery of treble damages multiplied by two is totally out of proportion to any harm that could have been caused by a violation of the antitrust laws—particularly when an antitrust defendant is now subject to large civil penalties and criminal liability under newly enacted law. Liability could be so great as to impair the viability of a defendant, which could result in the survival of only the largest of enterprises.

In addition, even if it were possible to postulate how an antitrust violation can adversely affect a State's general economy or retard its economic development in a manner independent from, or in addition to, injuries suffered to the business or property of citizens of the State, it would be extremely difficult, if not impossible, to measure accurately the amount of such independent injury. As the Supreme Court stressed in the *Hawaii* decision:

> Measurement of an injury to the general economy . . . necessarily involves an examination of the impact of a restraint of trade upon every variable that affects the State's economic health—a task extremely difficult, "in the real economic world, rather than an economist's hypothetical model." [12]

Thus permitting such recovery would result in damage estimates more hypothetical than real, and potentially out of proportion to any actual injury inflicted. Moreover, the margin of error would be multiplied by three.

Besides the danger of duplicative recovery and the extreme difficulty of measuring any independent or additional harm, a third reason militates against allowing the form of suit provided for under proposed Section 4C(a)(2). Even assuming the existence of independent or additional harm, the causal connection between an antitrust violation and the injury suffered by a State's general economy is extremely nebulous and indirect. Courts have always limited antitrust standing to those who are directly injured as a result of an antitrust violation and have denied relief for remote or indirect harm.[13] As Assistant Attorney General Kauper testified before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary last year, the right of action created by this provision could be broadly construed by the courts to expand the antitrust exposure of defendants in almost unlimited fashion and to a point that would be totally "unforseeable even by the most astute businessman." [14] Such a risk would be directly contrary to our traditional common law notions of recompensing a plaintiff for injuries suffered as a direct, provable and foreseeable result of a defendant's actions.

III

1. Notification and Suits by the United States Attorney General as Parens Patriae for Persons Residing in the State

Section 4D would require the Attorney General of the United States to notify a State attorney general whenever the former has brought suit under Section 4A of the Clayton Act and has "reason to believe" that a State attorney general could also sue on the same cause of action on behalf of persons of the State. If the State attorney general fails or declines to bring such an action within 90 days of notification, the Attorney General of the United States may bring a *parens patriae* suit in his place.

Assistant Attorney General Kauper succinctly articulated to the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary last year the difficult judgments which this type of provision would require the Attorney General to make. First, a judgment would be required, presumably before any substantial amount of discovery has taken place in the federal government's pending lawsuit, as to the possible liability of the defendant to the "persons" of *each* of the individual, several, 50 States.

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[11] Or as *parens patriae* for damages sustained by its citizens, if that concept is retained in the bill despite its deficiencies.

[12] 405 U.S. at 263, n. 14, *quoting from Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 493.

[13] See *e.g.*, *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F. 2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358 (9th Cir. 1955).

[14] *Hearings Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary on H.R. 12528 and H.R. 12921*, 93d Cong., 2d Sess., ser. 43, at 21, 30 (1974).

These decisions are difficult in themselves to make because of the insufficient amount of evidence at the disposal of the federal government at the time the decisions are presumably to be made and because of the vague standards established to guide in such determinations. The difficulties are then compounded by the provisions authorizing the Attorney General of the United States to bring suit as *parens patriae* on behalf of the State or States notified in default of the State attorney general's taking action. One can imagine the pressures which might be brought to bear by some State attorneys general to cause the Attorney General of the United States to bring suit on their behalf.

It is significant that the federal and State officials who would be intimately involved in carrying out this provision have opposed it. It has been stressed that the 90-day notification period is too short and removes the discretion a State attorney general needs to weigh countervailing factors, that it is inappropriate and impracticable to require a public official to bring an antitrust action, that the provision would operate as a disincentive to the maintenance of strong State antitrust enforcement staffs, and that the provision would unnecessarily strain the resources of the Antitrust Division.[15]

2. Recovery of Damages in Connection with Federally Funded State Programs

Section 4E of the bill would permit a State to obtain treble damages for the entire amount of overcharges or other damages sustained in connection with federally funded State programs "affected by antitrust violations." The Attorney General of the United States would have the right to intervene in the action to protect the interests of the United States and would have the power to sue on behalf of any State that fails or declines to bring such an action within 90 days after it has been notified by the Attorney General of the United States that he believes cause exists for bringing the suit.

It is unnecessary to repeat the points we made in connection with Section 4D which also apply to this provision. But in addition to those points, it is essential that Section 4E be amended so as to define what is meant by a federally funded State program that is "affected" by antitrust violations. Certainly, a State should be permitted to recover damages it has suffered as a direct result of an antitrust violation relating to a federally funded State program. But the vague connotation of the term "affected" could be interpreted as going beyond such permissible recovery. When the harm caused to the State is too remote from the antitrust violation, damages should not be recovered. This is the rule under present law. Accordingly, it is respectfully submitted that the first sentence of Section 4E should be amended to read as follows:

> A State shall be entitled to treble damages for the entire amount of overcharges or other damages it sustains as a direct result of antitrust violations aimed at a federally funded State program of that State.

Thank you, Mr. Chairman.

Senator HART. I am advised that because of witness schedule problems, we are changing the hours at which we resume tomorrow. The hearing tomorrow will begin at 9:30 rather than 10 o'clock. The first witness will be Mr. Ralph Nader, followed by Messrs Riehm and Wilson, representing the Chamber of Commerce. Everyone has schedule problems, and this is the best resolution that is possible.

We will conclude Mr. Nader's testimony not later than 10:15 in order to accommodate the schedule later in the day.

[Whereupon, at 11:50 a.m., the hearing was adjourned, to resume at 9:30 a.m., May 8, 1975, in room 2228, Dirksen Senate Office Building.]

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[15] *Id.* at 22, 30-31, 57-58, 85-86.

S. 1284—THE ANTITRUST IMPROVEMENTS ACT OF 1975

THURSDAY, MAY 8, 1975

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:40 a.m., in room 2228, New Senate Office Building, Hon. Senator Philip A. Hart, Michigan (chairman of the subcommittee and Senator James Abourezk, South Dakota) presiding.

Present: Senator Philip A. Hart, Michigan; Senator James Abourezk, South Dakota.

Staff present: Howard E. O'Leary, chief counsel; Bernard Nash, assistant counsel; Joseph L. Pecore (Senator Abourezk); Patricia Y. Bario, editorial director; Catherine M. McCarthy, chief clerk; Peter N. Chumbris, minority chief counsel; and Charles E. Kern (Senator Fong).

Senator HART. The committee will come to order.

Everyone has a schedule problem today. To attempt to hold as closely to course as possible—and with this slight delay in the introduction—we are now joined by the second of the two witnesses we will hear from first.

I would ask Ralph Nader, and Mark Green, to give us their impressions of the several proposals.

STATEMENT OF RALPH NADER AND MARK GREEN, CORPORATE ACCOUNTABILITY RESEARCH GROUP

Mr. NADER. Good morning, Senator Hart, members of the committee. With me is Mark Green, who is author of a number of books and articles on the antitrust situation.

I would like to summarize my prepared statement[1] on S. 1284, which is a long awaited attempt to improve antitrust enforcement by modernizing the procedures that comprise it.

As we previously argued in the closed enterprise system, for too long antitrust enforcement has been an ant eyeing an elephant—an under-funded and handicapped Federal program unable to contend with the great corporate power of our dominant firms.

Its failure has serious economic consequences for all consumers. And I am sure that the committee has seen a number of the estimates by scholars in this area. Estimates which, in the light of recent inflation, would probably have to be considerably upgraded.

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[1] See p. 146.

The provisions in title II involve the problem of how to get information in the process of enforcing the law. And the 1962 Civil Investigative Demand Act, which is very worthwhile, I think is now viewed by many observers of the antitrust scene as very limited. It needs to be extended as this legislation provides.

Title II of the antitrust improvements bill goes far toward making more efficient the unwieldy procedures that now comprise antitrust enforcement. There is no administrative, or equitable reason to make antitrust investigations of business into such a costly and time-consuming game.

Limiting CID's only to those under investigation deprives the Division, in the Justice Department, of compulsory access to competitors and suppliers who may have valuable information or insight into an anticompetitive market situation.

Allowing documentary discovery but not precomplaint oral depositions puts a perverse premium on the most burdensome form of legal communication—as firms receiving CID's often delay and then unload truckloads of documents on a stretched-out Antitrust Division staff.

Since the antitrust laws should be sensitive to incipient anticompetitive situations—especially announced or anticipated mergers—it is illogical to allow CID's only for current or past violations. Because such a significant percentage of antitrust resources are now devoted to regulatory proceedings—where an ultimate decision can be as competitively significant as any court proceeding—it requires legal blinders to allow CID's pursuant to possible lawsuits but not pursuant to regulatory proceedings.

In title V of the proposed legislation, the following can be said in summary. The Antitrust Division today looks for anticompetitive mergers in the same manner it has done for decades. It scans the Wall Street Journal, the trade press, and specialized business surveys like Moody's. The problems with this haphazard technique are self-evident.

First, it encourages business firms to quickly consummate a merger before the antitrust authorities can do anything about it. For example, the merger of the Washington Post and the old Times-Herald occurred, literally, overnight.

It went unreported beforehand by, yes, the Washington Post. "Within a day there was almost nothing left of the Herald," recalled Robert Wright, formerly the Deputy Assistant Attorney General in Charge of Antitrust of the Justice Department; "they obviously tried to sneak it by the Division because it's harder to overturn a fait accompli."

Although there is a lack of current data available, one Justice Department study found that the Antitrust Division was unaware of 30 percent of all large business mergers between 1953 and 1957. And it is far more difficult to undo a merger and recreate the original entities than to enjoin its occurrence in the first instance. Or, as one court put it, "After the saber thrust, the wound is still there."

Second, while a company may initially move with alacrity to complete a merger, it is then in its interest to delay an antitrust investigation and case as long as possible. For until there is an adverse settlement or adjudication, the defendant firm—assuming no preliminary injunction or hold separate order—may retain the fruit of a possibly

illegal merger. And the firm realizes that any profits earned as a result of the illicit marriage will not have to be subsequently disgorged.

A former Antitrust Division lawyer, now a defense attorney in New York City, told us in an interview: "Defense counsel tell their clients if the Antitrust Division sues, you will lose, but you can still gain 3 to 5 years to make your profit or acquire know-how from the illegal merger."

All of which drags antimerger cases on for years and years. Professor Kenneth Elzinga found that it took an average of 63.8 months, or over 5 years, from the time of an illegal merger to a final divestiture order.

To insure that merging firms have the incentive to give the antitrust agencies all necessary information, rather than to delay, requires an amendment to title V. It would establish that a merger could be consummated 60 days after its announcement or within 30 days of fully replying to an Antitrust Division CID or FTC section 6 inquiries, whichever takes longer.

Firms which want to merge would then realize it would be in their interest to expedite the antitrust investigation, rather than to—a la the New York lawyer, Bromley's practice as noted in the testimony earlier—protract it.

We are not, it should be noted, wedded to the 60-day $100 million in assets cutoffs established by this title. A predecessor bill introduced by then Chairman Emanual Celler, in 1956, H.R. 6748, allowed for a 90-day study period, which seems advisable.

And the FTC then recommended the benchmark that all firms above $10 million in assets report their merger plans. The $100 million litmus test would catch most large national mergers; but much concentration occurs locally and regionally, where the aggregate size may not be impressive, however market domination can, nevertheless, occur.

Mr. Chairman, this local or regional monopolistic, or anticompetitive practice situation, needs to be given much more emphasis. I would suggest, perhaps, if the staff would contact the district attorney in San Diego County—who has been investigating antitrust violations in the San Diego area—they could receive some very interesting illustrations. Not only of local firm anticompetitive practices, but of the extent to which relatively smaller anticompetitive practices—at the local level by larger national firms—prevail.

In such places as Hawaii—which itself can be called "one large monopolistic practice"—the amount of tie-ins, and interlocks basically have that economy in an antitrust violations stranglehold stretching all the way to the mainland, via the various shipping and export interlocks back down to the land development arenas. That needs to be emphasized again and again. I know that there is always a sentence or two thrown in, in the Antitrust Division speech about local or regional anticompetitive practices. But I submit, that after further inquiry, it may well be that there needs to be a massive increase in enforcement resources at these levels.

As I said, it is the merged firm that causes antitrust problems—not the two taken separately. The combined assets of the proposed consolidation should be the operating standard. Using this standard of combined assets, a $10 million consolidation seems a more preferable cutoff than a $100 million one.

Title VI of the legislation—when Antitrust Division cases, totalling an average of 65 cases a year for the past 6 years; and private antitrust cases over 1,000 a year, 1,229 in 1972—it becomes clear that private enforcement is an essential deterrent to antitrust illegality.

To the extent possible, the Government should facilitate civil suits subsequent to criminal antitrust cases so that wrongdoers are not merely punished, but that their victims are also compensated. Only then will antitrust justice be accomplished.

Historically, however, private litigants could not march into court and point to a consent decree, or a nolo contendere plea, as prima facie evidence of a defendant's liability. Section 6 of the Clayton Act specifically prohibits such settlements from use in subsequent private lawsuits.

As a result, plaintiffs seeking damages have often been compelled to reproduce much of the Division's case—an expense that can discourage potential claimants. Proving damages is monumentally difficult, as it is in antitrust civil suits, without the additional wasteful and costly burden of duplicating the Government's case to prove culpability.

To be sure, specific motions for disclosure of part of the Government's subpenaed material can be and have been granted by the courts; but often, they are not granted. Also, often there are great and expensive delays.

Nolo pleas, however, are supposed to be the equivalent of guilty pleas. By according nolo pleas prima facie effect, title VI fulfills this equivalency and enhances the repercussive deterrence of successful antitrust criminal cases.

For an agency that can bring only 65 cases a year—with an average of 17 of them on the criminal docket—this reform is necessary to fulfill the purpose of the antitrust laws. Somewhere, somehow, there must be an effective rebuttal to Kenneth Gailbraith's characterization of these antitrust laws as charades.

Critics of similar, earlier proposals have claimed that criminal defendants will no longer now capitulate before trial. Why plead nolo when you can be punished as much as a conviction; why not risk a trial when you have nothing more to lose?

If true, why does anyone ever plead guilty? Because when they know the Government has them cold—as it usually does in per se criminal price fixing cases: (a) they avoid the expense of a trial; and (b) they avoid the humiliation and loss of goodwill by an extended, publicized public trial.

This is not a hypothetical argument. Between 1954 and 1964, over 60 percent of those defendants whose nolo pleas were rejected by a court subsequently did plead guilty—accepting both criminal penalties and prima facie effect, rather than running the gauntlet of a public trial.

Still, there would be undoubtedly some defendants who would choose to go to trial; but this burden will hardly be excessive. If 40 percent of nolo settlements now go to trial, it might mean an extra seven trials a year for the Antitrust Division.

And to the extent some extra manpower may, indeed, be needed to field this additional work, a modest increase in the Antitrust Division budget could accompany S. 1284. In fact, S. 1136—with 40 Senate cosponsors—would triple the budgets of the Antitrust Division

and Federal Trade Commission within 3 years, an increase that could comfortably absorb any strains put on the Division by title VI.

I suppose, Mr. Chairman, you can look back on all those years—when you were pleading for expanded antitrust efforts—and be somewhat pleased by the number of legislators and administration officials who have now joined your cause.

In title IV, though private antitrust cases are on the rise, they suffer difficulties. Proving damages is often laborious; judges have considered class actions unmanageable, where hundreds of thousands of similarly situated consumers suffered small damages, with commodities like milk and bread. And the notice and the legal costs of antitrust class actions can be prohibitive.

It is entirely appropriate that the State, which speaks collectively for its citizens, to marshall its tax-supported resources to represent a class which would otherwise go unrepresented—i.e., where the bilk is aggregately large, though individually small; or to obtain damages "to the general economy of that State"—where a political jurisdiction has, indeed, been economically disadvantaged due to an antitrust violation.

In the latter situation, however, unexpected liability, when trebled, could easily bankrupt culpable local or State firms. Therefore, it may be advisable to provide only single damages for injuries "to the general economy of that State."

Also, in a society of 210 million citizens and trillions of commercial interchanges annually it is essential to permit, as 401(c)(1)(A) does, "statistical or sampling methods" to compute damages. Otherwise, given the impossibility of tracing and evaluating millions of non-recorded transactions, there will be wrongs without remedies.

In a complex, mass society, it is necessary for sectors from corporate planning to TV ratings to depend on statistical or sampling methods to arrive at important decisions. For courts to ignore this reliable modern math would elevate form over substance, and knowingly permit wrongdoers to retain the fruits of their illegal action. This is what occurs again and again and again, in the economy.

Finally, antitrust enforcement can only be as wise and expeditious as the data it receives. Yet the antitrust agencies are precluded by statute from obtaining census data by firm name—the announced intention of the Federal Trade Commission is to keep its line of business reports away from the antitrust authorities.

Why, in this case, should the right hand of the Government not know what the left hand is doing? "Artificial bodies such as corporations depending upon statutory law for their existence or privileges," said Theodore Roosevelt in his first inaugural address, "should be subject to proper governmental supervision, and full and accurate information as to their operations should be made public at reasonable levels."

These words are especially true today, as our corporate-conglomerate complexes wind themselves through the society in increasingly complicated patterns. For the antitrust agencies to work effectively they should have easy access to Census and FTC classifications—up to seven-digit SIC classifications where they exist.

Then the agencies would easily come to prudent enforcement judgments within 60 days of an announced merger. To somehow say that corporations are entitled to privacy about such data—that is,

corporations which, like GM or IBM, are larger and more influential than most States—is an abuse of language and commonsense. It sacrifices antitrust enforcement to a legal fiction.

Thank you, Mr. Chairman. Mr. Green and myself will be pleased to reply to your inquiries.

Senator HART. Thank you very much, Mr. Nader. Both you and Mr. Green over the years have focused on the need for—and have generated in an important part the support that is now developing for the proposal the committee is in the process of considering. All of us are grateful.

I should explain that, while I was listening, I was concerned with a bill that will come before the Commerce Committee for markup at 10:30. This bill would explain to Detroit exactly what it should do with respect to fuel-efficient cars. I want to have a reasonable understanding of this at that time. For that reason, I will ask staff to develop the questions that, together, we planned to present to you.

In the statistics that you may or may not have, you noted in your prepared testimony that it averages 63.8 months between time the merger was determined to be inpermissible and the final divestiture.

I remember the seemingly endless delay with respect to divestiture of Pacific Northwest Pipeline Co. by El Paso Natural Gas Co. There it ran, according to our notes, about 14 years from acquisition to actual divestiture—even though the decision of the Supreme Court was rendered in less than 5 years.

Now, do you have any statistics as to the average length of time elapsed between the final divestiture orders, and actual divestiture?

Mr. GREEN. Mr. Chairman, I do not believe such data exists. Or, at least, we have not come across it. The 63.8 months statistic came from a factual dissertation by economist Kenneth Elzinga.

Indeed it would be, I think, a worthwhile function for the committee to inquire into the Antitrust Division and the FTC to judge how long it takes, on the average, from divestiture order to ultimate divestiture.

I do recall that cases, like the *GM-Dupont* case, took years even after the second Supreme Court decision finally saying: "Yes, Dupont you must divest yourself of GM stock." And we have more recent experience of the difficulty of requiring ITT to divest itself of some of its subsidiaries, pursuant to its 1971 consent judgment.

But the point you make, I think, is a very telling one. Paraphrasing the great Brandeis wisdom that "Justice delayed can be justice denied," it is an operating standard in antitrust cases to delay as long as possible since it is in the interest of the merging parties to maintain their consolidation, and the profits resulting from it, for as long as possible.

Senator HART. Well, maybe we can together with the Commission, develop a chart to dramatize this thing, before asking another quick reaction.

You suggest that the $100 million in sales, or assets figure, in this premerger notification section—which is title V—was too high. You suggest a $10 million combined figure.

Now, yesterday, Chairman Engman told us that $100 million was too low; he suggested $250 million. As I thought about your suggestion, I am reminded again that there is no crystal ball that tells us in advance what the wise and prudent figure is in any of these things.

But would it not be likely—and Engman did not make this clear—that if we had a $10 million combined entity figure that would trigger

this prenotification, then the Government would break down under the paperwork that would flow in?

Again, I suppose it depends on the statistic—do we really know how many proposed mergers were at what level? Again, maybe we ought to chart this.

Mr. NADER. I do not think it is that burdensome a situation. That does not need to be the subject of estimate. The Federal Trade Commission can give you, I think, on short notice an estimate of how many such cases there would be in a given year.

Unless the Federal Trade Commission and the Antitrust Division are really going to give up on locally based type monopolies, I think it is important that that be the cutoff level. With a larger staff, whatever perceived burden there is should be considerably ameliorated.

But that is where the vortex of much of this antitrust violation is—at the local level where markets can be monopolized.

Senator HART. Was this the point you were making about San Diego?

Mr. NADER. Yes. Take situations, for example, with mergers of medical laboratories, which are relatively small, that can have a very crushing effect on local consumers: but it would never surface under the $100 million, or $250 million cutoff situation.

I know what Chairman Engman has in mind. He has in mind the big cases, the deterring effect of the big cases, and they are supposed to be directly more cost effective. But if you look at the way the Treasury Department enforces the tax laws, perhaps they go to the other extreme. But their point is: If they go after a number of small cases, then the deterring effect for a large number of small cases will be strong. So that, in the aggregate, the large number of small cases deterrent can be quite significant.

But if these small mergers really know that they are beyond the visibility tail of the Federal antitrust enforcement arm, they are going to proliferate—which is exactly what has been occurring.

Senator HART. You are right. The odds are all in the favor of the pair of relatively small units merging without any expression, even of concern. So, in a sense, I understand the problem they have downtown.

Mr. NADER. In fact, I think some of the hearings that your committee held some years ago on medical laboratories illustrates the really sharp impact—it may not be in the aggregate billions of dollars—however, it is a very sharp impact on patients.

Senator HART. Before staff has questions, Mr. Chumbris has a comment.

Mr. CHUMBRIS. Thank you, Mr. Chairman. Mr. Nader and Mr. Green, we welcome you. I would like to read a quote from a hearing on the Industrial Reorganization Act: Page 197 of the hearings, Chairman Hart, asked of witnesses Drs. McCracken and Thomas Moore, and I am quoting from the record.

> Senator HART. On the business of labor as the powerful factor in inflation, Dr. Mueller, on the opening day had some comments on the interactions of labor unions and concentrated industries in this country.

As he put it—and this is Dr. Mueller speaking:

> Organized labor also may cause cellar inflation if it is successful in demanding wage increases that exceed the increases in productivity. This is usually called, cost-push inflation, a pushing up of production costs by labor. While this kind of labor-oriented cost-push inflation could theoretically occur in any industry with powerful labor unions, it most often occurs in those industries in which strong labor unions bargain with concerns having substantial marketpower."

And he goes on, raising the question that labor unions ask for a bigger piece of the pie and believe that these concerns will "pass on" higher wage costs to consumers. And then I go back to Professor Moore, and Dr. McCracken, who were the witnesses at that time.

Professor Moore, formerly of Michigan State, and now of Stanford University, stated as follows:

I would like also to state that there is a tendency in more concentrated industries for prices to actually lag in the upswing, and then later catch on.

And after he finished his comment, I made this comment with the witness:

Mr. CHUMBRIS. Mr. Chairman, if I may interject, both Dr. Moore and Dr. McCracken, have not had the advantage of seeing Dr. Weston's paper that he is going to present this afternoon. But Dr. Weston makes that point particularly clear in his paper, that during inflationary periods the increase in price was much slower than in the unconcentrated industries.

And beginning on page 234, Dr. Weston proves his point, which now brings me to this point. In discussing these amendments to the antitrust laws, in S. 1284 we are only dealing with areas affecting business, and there is nothing in the bill which may have curb on the labor unions, which many economists agree have as great an impact on inflationary prices.

Now, do you wish to comment?

Mr. NADER. Well, as you know, Mr. Chumbris, labor has traditionally been exempted on the grounds it is not a commodity, in effect. And that the labor cost is only a portion of the overall factors that go into management——

Mr. CHUMBRIS. Sixty-five percent of the sales dollar goes into labor costs, according to testimony we have had in the hearing; 40 to 65 cents of every dollar of the price of an article is a labor-oriented cost.

Mr. NADER. I have heard even higher estimates. It is often a source of wonderment to me how some conservative economic observers seem to reflect Marx's theory of labor value in determining that percentage.

In heavy industry, for example, if you look at the labor input for the production of a car it is much, much less than that. There is a Wall Street Journal article about 15 years ago pointing to something like $180 to $200 factory labor input in the production of a car by General Motors. It is higher now, but it does indicate that this figure is meaningless when taken across the board.

You have to go on an industry-by-industry basis. I think where a labor union colludes with a company to restrain trade, it should not be exempted from antitrust law enforcement. I do not think, however, that wage negotiations and bargaining per se can legitimately be covered by the antitrust laws.

If this situation wants to be covered by wage-price controls, or other forms of public policy, that seems to me much more advisable. Because once you go into a labor-management negotiation, bring them all under the antitrust laws, then all management-labor negotiations—because it takes two to tango, particularly in oligopolistic industries where the transfer to the consumer is eased—all these management-labor negotiations would have to be brought under the antitrust laws. I do not think the antitrust laws should have that burden; that should be a different legal apparatus to deal with that problem.

But if you have a union—an example:

Let us say the building trades unions are in collusion with the electric utilities in the building of a breeder reactor to block the entry of solar energy for other forms of energy. That, to me, would be a restraint of trade that should be included under the antitrust laws.

Mr. CHUMBRIS. And you are aware that we have had, for a number of years, bills introduced into the Senate and, into the House, to have the exemptions that now favor the labor unions deleted from the antitrust laws. That is why I raised the question at that point.

Thank you, Mr. Chairman.

Senator HART. You know that exemption of labor under the antiturst laws is not as wide and sweeping as some of the propagandist would have us understand. When they get beyond wages, hours, and working conditions, they are in just as dead deep trouble as anybody else.

Mr. Nash?

Mr. NASH. Mr. Nader, or Mr. Green, you might have noted in Assistant Attorney General Kauper's statement of yesterday that he recommended that copies of the transcripts of all statements taken by the Antitrust Division, under the CID statute, be made available to the person whose testimony is so taken.

Now, frankly, that does have appeal to me, at least, on my civil libertarian side. But then again, on the other hand, I am a little concerned that if oral testimony were to be taken from, say, alleged coconspirators in a price-fixing scheme, and if the testimony went on over a period of days or weeks, then the opportunity would exist for copies of the transcript to be exchanged.

And when copies of transcripts are exchanged, it does sit in certain people's minds that certain ideas can be generated—which otherwise might not have been there. In fact, that is what occurred about 6 months ago at the Federal Trade Commission in the AGA natural gas conspiracy investigation.

So I am wondering what your opinion might be both as a civil libertarian and as a believer in strict antitrust enforcement?

Mr. GREEN. Mr. Nash, in the era of the Xerox machine—I inadvertently brought a brand name into the testimony—it is obviously easy to quickly reproduce the transcript of an oral deposition, and circulate it to others who in the future may be orally deposed by the Antitrust Division under this proposed statute.

They could, then, very easily choreograph all their answers and by that means frustrate a tough investigation of a possible antitrust violation.

I, too, consider myself a strict civil libertarian. However, a grand jury looking into crime, which is more serious than the civil violations under this act, do not necessarily permit witnesses to be provided transcripts of what they said.

Especially in antitrust cases, where the people being deposed may have a disposition toward conspiratorial behavior, I think it is probably unwise to encourage a "legal" conspiracy, which may occur if they circulated the materials among themselves.

Mr. NASH. Are you familiar with the practice of any of the other regulatory agencies here, in Washington, where they undertake civil investigations?

Mr. GREEN. No, I am not.

Mr. NASH. We have heard from a number of witnesses at the hearing, and the prepared statement of others indicate the same theme with respect to parens patriae, namely, that certainly fairness, if not the due process requirement of the Constitution, compels actual notice to individual consumers before the State should be permitted to file an antitrust civil damage action as parens patriae on behalf of the citizens of the State.

I am sure the subcommittee would benefit from your view as to whether, without notice, you believe consumers rights will be stripped away through possible less than the best settlement—or less than the best representation.

Mr. NADER. I think a notice is very desirable. You have to, I think, premise any Government action on letting the people know what is coming so that those who are particularly interested in monitoring, or participating in the action, can do so.

Mr. GREEN. I would add one qualifier to that, perhaps. Often in antitrust conspiracies there are millions of individuals who may be victimized in comparably small amounts; and it is often financially, or realistically, impossible to notify each past purchaser; that is, if there are no records of the 2 million people who bought bread in Philadelphia for a 2-year period in the 1960's.

Therefore, general notice should suffice when individual notice is impossible. And if you insist on the latter, as rule 23 may indeed insist on after the *Eisen* case, then you are in effect abrogating the possibility of aggregate class suits to remedy aggregate manufacturing bilks.

Mr. NASH. My question should have said "actual notice" as contrasted with "notice by publication."

Mr. NADER. I understood the latter.

Mr. NASH. I have no further questions.

[The prepared statement of Ralph Nader and Mark Green follows. Testimony resumes on p. 151.]

PREPARED STATEMENT OF RALPH NADER AND MARK GREEN, CORPORATE ACCOUNTABILITY RESEARCH GROUP

We appreciate this opportunity to comment on S. 1284, which aims to improve antitrust enforcement by modernizing the procedures that comprise it. As we have previously argued in *The Closed Enterprise System*, for too long antitrust enforcement has been an ant eying an elephant, an under-funded and handicapped federal program unable to contend with the great corporate power of our dominant firms. Its failure has serious economic consequence for all consumers. As competition lags, innovation and productivity decline, and prices climb artificially high. Professor William Shepherd has projected that anti-competitive practices and structures in our economy cost consumers some $30 billion in higher prices annually; professor David Kamerschen has estimated that the failure of competition leads to an annual "lost GNP" of some $60 billion annually; and economists Gardner Means and John Blair recently explained the correlation between economic concentration and inflation to the President's Council on Wage and Price Stability.

Indeed our national economic crisis makes it more imperative than ever that monopolistic practices—which reduce output and raise prices, thereby inflaming recession and inflation simultaneously—be curbed. To do that requires improving the quantity and quality of antitrust enforcement. Both President Ford and the House leadership, in nearly identical language, have committed themselves to pursue anti-monopoly solutions. In this respect they are accurately mirroring the national mood. A 1965 Opinion Research Corporation poll found that 52 percent of the public thought that large companies had too much power concentrated in their hands and 37 percent thought these firms should be broken up; by 1974, 75 percent thought their power excessive and 53 percent thought they should be decentralized.

This confluence of general public and political support must now be translated into remedial legislation. Otherwise antitrust—like George Washington's birthday or Memorial Day—will be commemorated but not really observed.

Title II.—Developing a civil antitrust case is an art and a chore. It requires the search for a pattern of economic events rather than the kind of clue that suddenly unravels TV detective mysteries. In this it is like weaving a complex tapestry—with, instead of a modern loom, the single needly and thread of the 1962 Civil Investigative Demand Act.

That law, to be sure, was an advance at the time. Prior to 1962 there were three logically possible, but actually unproductive, ways to obtain information in civil cases: one could ask the firms to disclose information voluntarily, but, to no one's surprise violators did not confess; the use of FTC investigatory powers for the benefit of the Attorney General, permitted by statute, was never attempted, "presumably because of the budgetary problems involved in making the FTC the investigative arm of the Department of Justice" said one Antitrust Division official; or, lacking the necessary evidence, a suit could be filed in the hope that discovery proceedings would turn it up—a form of prosecutorial brinksmanship.

By the early 1960s many firms under investigation were refusing to supply any requested data to the Division. "The situation is getting steadily worse," Attorney General Robert Kennedy protested. "We are just not getting cooperation from the business community of the United States." In 1962, and after several attempts, Congress finally passed a Civil Investigative Demand Act, which stated: "Whenever the Attorney General or Assistant Attorney General . . . has reason to believe that any person under investigation may be in . . . control of any documentary material relevant to a civil antitrust investigation, he may . . . issue . . . a civil investigative demand [CID] requiring such person to produce such material for examination." As drafted and passed, however, the bill had serious omissions: information could be obtained only from a firm "under investigation," not other parties or potential witnesses; the later release of information to private plaintiffs was forbidden; and there was no provision for "oral" CIDs—"deposing" the potential defendants and cross-examining them. As former Antitrust Division chief Lee Loevinger acknowledged in a 1970 interview, these provisions were dropped as the price for getting *some* bill passed. While some congressmen inveighed against "the prying eyes of a powerful bureaucracy," the statute was needed to keep antitrust from going the way of the buffalo.

Title II of the "Antitrust Improvements Bill" goes far toward making more efficient the unwieldly procedures that now comprise antitrust enforcement. There is no administrative or equitable reason to make antitrust investigations of business into such a costly and time-consuming game. Limiting CIDs only to those "under investigation" deprives the Division of compulsory access to competitors and suppliers who may have valuable information or insight into an anticompetitive market situation. Allowing documentary discovery but not pre-complaint oral depositions puts a perverse premium on the most burdensome form of legal communication—as firms receiving CIDs often delay and then unload truckloads of documents on a stretched-out antitrust Division staff. Since the anitrust laws should be sensitive to incipient anticompetitive situations, especially announced or anticipated mergers, it is illogical to allow CIDs only for current or past violations. Because such a significant percentage of antitrust resources are now devoted to regulatory proceedings, where an ultimate decision can be as competitively significant as any court proceeding, it requires legal blinders to allow CIDs pursuant to possible lawsuits but not regulatory proceedings.

Title II would specifically correct all these deficiencies. It also contains numerous and adequate safeguards for those whose knee-jerk reaction will be to condemn "the prying eyes of a powerful bureaucracy"—which is really just a pretext to avoid the successful operation of the antitrust laws against themselves.

Title III.—This provision prudently increases the fine for violation of FTC special orders and subpoenas from $100 a day—first established when movies cost about a nickel—to a far more modern and realistic $1000 to $5000 a day. If ever Holmes' "bad man" theory of law has relevance it is here, as sophisticated. businessmen make rational computations whether obstruction is more profitable than cooperation. Title III helps revise their computation so as to help make cooperation now both rational and economical. This new requirement is especially timely for the FTC, as it begins to pursue its new line-of-business reporting. Given the business hostility this program has inspired, stricter penalties for noncompliance appear necessary.

However, § 301(b)(3)—which permits a court to stay the daily accumulation of penalties if the party demonstrates "that the equities clearly favor such stay"—seems extraneous, unduly permissive and potentially self-destructive. Its vague language makes it an exemption which, in the hands of anti-government, pro-business judges, can swallow the entire title. Section 301(b)(1) and (2) are adequate guarantees against inequitable application of this provision.

Title V.—The Antitrust Division today looks for anticompetitive mergers in the same manner it has done for decades: it scans the *Wall Street Journal*, the trade press and specialized business surveys like *Mood's*. The problems with this haphazard technique are self-evident.

First, it encourages business firms to quickly consummate a merger before the antitrust authorities can do anything about it. For example, the merger of the *Washington Post* and the old *Times-Herald* occurred literally overnight. It went unreported beforehand by, yes, the *Washington Post*. "Within a day there was almost nothing left of the *Herald*," recalled Robert Wright, formerly the Deputy Assistant Attorney General in Charge of Antitrust; "they obviously tried to sneak it by the Division because it's harder to overturn a *fait accompli*." Although there is a lack of current data available, one Justice Department study found that the Antitrust Division was unaware of 30 percent of all large business mergers between 1953 and 1957. And it is far more difficult to undo a merger and recreate the original entities than to enjoin its occurrence in the first instance—or as one court put it, "After the saber thrust, the wound is still there" (*Crane Co.* v. *Briggs Manufacturing Co.*, 280 F. 2d 747, 750 (6th Cir. 1969)). Sales forces are fused, stocks combined and trade names merged so that it may become impossible to carve two on-going concerns out of one. This helps explain why commentators agree that the divestiture record of the antitrust agencies is so dismal. (*See*, Elzinga, "The Anti-merger Law: Pyrrhic Victories?" 12 *J. of Law & Economics* 43 (1969); "Divestiture of Illegally held Assets: Observations on its Scope, Objectives and Limitations," 64 *Michigan L. Rev.* 1547 (1966); "Preliminary Injunctions for the FTC in Merger Cases," 52 *Cornell L.Q.* 461 (1967); "Preliminary Relief for the Government Under Section 7 of the Clayton Act," 79 *Harvard L. Rev.* 391 (1965); "Divestiture in Light of the *El Paso* Experience," 48 *Texas L. Rev.* 792 (1970)). To take a concrete and memorable example—ITT successfully argued that the Justice Department wouldn't dare try to undo its acquisition of the Hartford Fire Insurance Co. because to do so would send shock waves through the financial and international markets. Of course, ITT would not have been able to make this argument if the merger had not been consummated pending the lawsuit.

Second, while a company may initially move with alacrity to complete a merger, it is then in its interest to delay an antitrust investigation and case as long as possible. For until there is an adverse settlement or adjudication, the defendant firm (assuming no preliminary injunction or hold separate order) may retain the fruit of a possibly illegal merger. And the firm realizes that any profits earned as a result of the illicit marriage will not have to be subsequently disgorged. A former Antitrust Division lawyer, now a defense attorney in New York City told us in an interview, "Defense counsel tell their clients: if the Antitrust Division sues, you will lose, but you can still gain three to five years to make your profit or acquire know-how from the illegal merger." Former judge and now antitrust defense counsel Bruce Bromley put it even more candidly a few years ago. "Now I was born, I think, to be a protractor," he said. "I quickly realized in my early days at the bar that I could take the simplest antitrust case that Judge Hansen could think of and protract it for the defense almost to infinity . . . If you will look at that record [*United States* v. *Bethlehem Steel*], you will see immediately the Bromley protractor touch in the third line. Promptly after the answer was filed I served quite a comprehensive set of interrogatories on the Government. I said to myself, 'That'll tie brother Hansen up for a while,' and went about other business." all of which drags anti-merger cases on for years and years. Professor Kenneth Elzinga found that it took an average of 63.8 months—or over five years—from the time of any illegal merger to a final divestiture order.

There are in fact, precedents for pre-merger notification which indicates that this process can lead to more efficient and certain antitrust enforcement. Amendments to the AEC Act (84 Stat. 1473) passed in 1970 gave the Attorney General prior authority to review any application for a nuclear power plant license to "make a finding as to whether activities under the license would create or maintain a situation inconsistent with the antitrust laws." According to Antitrust Division section chief Joseph Saunders, "In the AEC, companies want a license, and there is every incentive for them to work with us to clear up the antitrust problems."

As another example, the 1966 Bank Merger Act requires merging banks to provide the three federal banking agencies with data pertinent to their proposed merger. Once a federal banking agency approves a merger, the Antitrust Division has 30 days within which to file suit, or waive an antitrust challenge. The reason this process works so expeditiously is that the Antitrust Division has the information, needed to make a determination, readily available from the federal banking agencies. To insure that merging firms have the incentive to give the antitrust agencies all necessary information, rather than to delay, requires an amendment to Title V. It would establish that a merger could be consummated 60 days after its announcement *or* within 30 days of fully replying to an Antitrust Division CID or FTC § 6 inquiry, whichever takes longer. Firms which want to merge would then realize it would be in their interest to expedite the antitrust investigation, rather than to, *a la* Bromley, protract it.

We are not, it should be noted, wedded to the 60 day, $100 million in assets cut-offs established by this title. A predecessor bill introduced by then chairman Emanual Celler in 1956 (H.R. 6748) allowed for a 90 day study period, which seems advisable. And the FTC then recommended the benchmark that all firms above $10 million in assets report their merger plans. The $100 million litmus test would catch most large national mergers, but much concentration occurs locally and regionally, where the aggregate size may not be impressive but where market domination can nevertheless occur. Also, since it is the merged firm that causes antitrust problems, not the two taken separately, the *combined* assets of the proposed consolidation should be the operating standard. Using this standard of combined assets, a $10 million consolidation seems a more preferable cut off than a $100 million one.

Critics of similar proposals in the past have argued that it is unfair to delay all large mergers through just a few are illegal; also, it is said that any delay could lead to a shift in the relative stock prices of the firms, which could then upset the merger altogether. (Actually, due to a) *Brown Shoe* and *Von's Grocery* especially (*Brown Shoe v. United States*, 370 U.S. 294 (1962); *United States v. Von's Grocery*, 384 U.S. 220 (1966)), b) the anticonglomerate principles underlying the 1971 ITT settlement and c) the "incipiency" rationale of Section 7 of the Clayton Act, the Justice Department and Federal Trade Commission have broad authority to challenge many mergers, including those involving seemingly small merger percentages. And if an antitrust review leads a firm to withdraw from the proposed merger—ITT, for example, withdrew its tender offer to ABC when the Antitrust Division challenged their plans in 1967—that is not the concern of the antitrust laws. As antitrust law enforcers will tell you, there are invariably non-antitrust reasons cited why an antitrust action should or should not be taken. Any speculative effect of an antitrust inquiry on stock prices should in no way influence the enforcement of the antitrust laws.

Title VI.—With Antitrust Division cases totalling an average of 65 cases a year for the past six years, and private antitrust cases over a thousand a year (1229 in 1972), it becomes clear that private enforcement is an essential deterrent to antitrust illegality. To the extent possible, the government should facilitate civil suits subsequent to criminal antitrust cases, so that wrong-doers are not merely punished but their victims also compensated. Only then will antiirust Justice be accomplished.

Historically, however, private litigants could not march into court and point to a consent decree or a *nolo contendere* plea as *prima facie* evidence of a defendant's liability; § 6 of the Clayton Act specifically prohibits such settlements from use in subsequent private lawsuits. As a result, plaintiffs seeking damages have often been compelled to reproduce much of the Division's case, an expense that can discourage potential claimants. Proving damages is monumentally difficult as it is in antitrust civil suits, without the additional wasteful and costly burden of duplicating the government's case to prove culpability. To be sure, specific motions for disclosure of part of the government's subpoenaed material can be and have been granted by courts, but often they are not granted.

Nolo pleas, however, are supposed to be the equivalent of guilty pleas. By according *nolo* pleas *prima facie* effect, Title VI fulfills this equivalency and enhances the repercussive deterrence of successful antitrust criminal cases. For an agency that can bring only 65 cases a year, with an average of 17 of them on the criminal docket this reform is necessary to fulfill the purpose of the anti-trust laws.

Critics of similar, earlier proposals have claimed that criminal defendants will now no longer capitulate before trial. Why plead *nolo* when you can be punished as much as a conviction; why not risk a trial where you have nothing more to lose?

If true, why does anyone ever plead guilty? Because when you know the government has you cold, as it usually does in *per se* criminal price fixing cases, a) you avoid the expense of a trial and b) you avoid the humiliation and loss of good will by an extended, publicized public trial. This is not a hypothetical argument. Between 1954 and 1964, over 60 percent of those defendants whose *nolo* pleas were rejected by a court subsequently did plead guilty, accepting both criminal penalties and *prima facie* effect rather than running the gauntlet of a public trial. In a related context, *Fortune* magazine understood that "the very fact of being assailed as a polluter, or price-fixer, or discriminator can damage a company's reputation. The prospective damage to its public image was a factor in American Standard's decision three years ago to pay $15 million in the settlement of four antitrust class actions." (Carruth, "The 'Legal Explosion' Has Left Business Shell-Shocked," *Fortune*, April, 1973, at 65, 66.)

Still, there would undoubtedly be *some* defendants who would choose to go to trial, but this burden will hardly be excessive. If 40 percent of *nolo* settlements now go to trial, it might mean an extra seven trials a year for the Antitrust Division. An actual criminal antitrust trial has been estimated by Division staff as consuming only 5–10 percent of the resources of an entire criminal proceeding—from investigation to sentencing. Since most of the work is done well before trial (unlike in civil cases), the cost of going to trial here is minimal. And to the extent some extra manpower may indeed be required to field this additional work, a modest increase in the Antitrust Division budget could accompany S. 1284. In fact, S. 1136, with 40 Senate co-sponsors, would triple the budgets of the Antitrust Division and FTC within three years, an increase that could comfortably absorb any strains put on the Division by Title VI.

Title IV.—For reasons already elaborated, federal antitrust enforcement alone is not adequate to deter antitrust violations. Private actions are also necessary, though again not sufficient. About 75% of private antitrust suits follow successfully litigated government judgments; yet of 156 such government antitrust victories from the passage of Section 5 of the Clayton Act in 1914 through June 30, 1959, only 29 were followed by treble-damage suits. Apparently the *prima facie* presumption of defendant liability arising from litigated government judgments (or guilty verdicts) is necessary but not a sufficient aid to the treble-damage plaintiff. Professor John Guilfoil found that "from 1940 to 1963 . . . in price-fixing cases exclusive of electrical equipment suits, there exists *no* case where a Government judgment of guilty preceded court-awarded damages. But there were eight suits which plaintiffs lost that followed verdicts of guilty in Government suits." These figures do not include the approximately one-fourth of private antitrust suits that are settled out of court.

Though private antitrust cases are on the rise, they suffer difficulties. Proving damages is often laborious; judges have considered class actions "unmanageable" where hundreds of thousands of similarly-situated consumers suffered small damages with commodities like milk and bread; and the notice and legal costs of antitrust class actions can be prohibitive. It is entirely appropriate that the State, which speaks collectively for its citizens, to marshall its tax-supported resources to represent a class which would otherwise go unrepresented (i.e., where the bilk is aggregately large though individually small) or to obtain damages "to the general economy of that state," where a political jurisdiction has indeed been economically disadvantaged due to an antitrust violation. (In the latter situation, however, unexpected liability, when trebled, could easily bankrupt culpable local or state firms; therefore, it may be advisable to provide only single damages for injuries "to the general economy of that state.")

Also, in a society of 210 million citizens and trillions of commercial interchanges annually, it is essential to permit, as § 401(c)(1)(A) does, "statistical or sampling methods" to compute damages. Otherwise, given the impossibility of tracing and evaluating millions of non-recorded transactions, there will be wrongs without remedies. In a complex, mass society, it is necessary for sectors from corporate planning to TV ratings to depend on statistical or sampling methods to arrive at important decisions. For courts to ignore this reliable modern math would elevate form over substance and knowingly permit wrong-doers to retain the fruits of their illegal action.

Two final points warrant mention. As we know from the history of antitrust legislation, reform packages like S. 1284 become law perhaps once in a generation. If there is an antitrust improvement not included within this laudable piece of legislation, it may be years before it reappears. Ignoring for the moment the issue of overall funding, which is taken up by S. 1136—to modernize a creaky antitrust machine requires two further reforms.

Antitrust enforcement can only be as wise and expeditious as the data it receives. Yet the antitrust agencies are precluded by statute from obtaining census data by firm name, and the announced intention of the FTC is to keep its line-of-business reports away from the antiturst authorities. Why in this case should the right hand of the government not know what the left hand is doing? "Artificial bodies such as corporations depending upon statutory law for their existence or privileges," said Theodore Roosevelt in his first Inaugural Address, "should be subject to proper governmental supervision, and full and accurate information as to their operations should be made public at reasonable levels." These words are especially true today, as our corporate-conglomerate complexes wind themselves throughout society in increasingly complicated patterns. For the antitrust agencies to work effectively, they should have easy access to Census and FTC classifications—up to 7 digit SIC classifications where they exist. Then the agencies could easily come to prudent enforcement judgments within 60 days of an announced merger. To somehow say that corporations are entitled to "privacy" about such data—corporations which, like GM or IBM, are larger and more influential than most states—is an abuse of language and common sense. It sacrifices effective antitrust enforcement to a legal fiction.

And second, consent decrees should also have *prima facie* effect in subsequent private civil actions. The arguments favoring this proposal parallel those of *nolo* pleas. Again, there may be some additional cases for the Antitrust Division and FTC to try in court. But a tripled budget could easily absorb this increment. Every dollar spent could be considered a sound investment, the dividends being that many more private actions will be successfully filed. The ultimate deterrent effect could be substantial, making the plotting antitrust violator come to the calculation that illegal conduct is no longer worth the gain. When we conducted a survey of the presidents of *Fortune's* top 1000 firms in 1971, 60 percent of the 110 respondents agreed with the proposition that many firms fix prices. S. 1284, with this amendment, would reduce this extraordinary estimate of antitrust illegality.

After decades of stumbling over hurdles that they and Congress have created, it is essential that the federal antitrust agencies improve their effectiveness—a goal the Hart-Scott Antitrust Improvements Act would accomplish. Our current economic crisis makes this the moment to match antitrust rhetoric and antitrust reality.

Senator HART. Thank you very much. Our next witnesses are Mr. J. W. Riehm, vice president and secretary, Thomas J. Lipton, Inc.; and Mr. J. Randolph Wilson, Covington and Burling, on behalf of the U.S. Chamber of Commerce.

STATEMENT OF J. W. RIEHM, VICE PRESIDENT AND SECRETARY, THOMAS J. LIPTON, INC., AND J. RANDOLPH WILSON, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE, ACCOMPANIED BY FRED BYSET, STAFF EXECUTIVE, CHAMBER ANTITRUST AND TRADE REGULATION COMMITTEE

Mr. RIEHM. There is much in title I, the "Declaration of Policy," with which no reasonable man could disagree. The chamber of commerce emphatically endorses this initial finding that "this Nation is founded upon and committed to a private enterprise system and a free market economy." We agree that some "regulatory policies" have caused a "decline of competition."

We support a policy of effective and expeditious enforcement of the antitrust laws. Virtually every other statement in the section, however, is either inaccurate or grossly exaggerated.

The gravest error of all is the suggestion that this act can contribute significantly to reducing prices, unemployment, and inflation. It cannot. The idea that antitrust measures or attacks on concentration will have any impact on unemployment and inflation can be dispelled, without intensive economic analysis, simply by viewing recent history.

This country had relatively stable prices and employment levels in the early 1960's; it has experienced severe inflation and rising unemployment in recent years. It cannot be seriously claimed that there has been a significant change in concentration, or decline of competition or reduction in the vigor of antitrust enforcement between these two periods of time.

What have changed are the levels of Government spending and the rates at which money has been created. The attempt by Government to blame industry for conditions that Government itself has caused is dangerous as well as unfair.

It could be argued, of course, that the preliminary rhetoric in legislation, which will presumably be echoed in the public statements of its supporters, is not really important and that, therefore, accuracy is immaterial. This is a shortsighted view.

Exaggerated and inaccurate claims can do a great deal of harm, since they tend to gain credence through constant repetition.

Consider, for example, a statement on August 1 of last year by Thomas E. Kauper, Assistant Attorney General for Antitrust. Mr. Kauper referred to estimated consumer losses of $80 billion a year, because of "ineffective competition and illegal anticompetitive conduct."

Since then, this estimate has been thoroughly discredited. It began with F. M. Scherer, now Chief Economist at the Federal Trade Commission, who wrote in a book a few years back that ineffective competition costs 6.2 percent of the gross national product.

Applying 6.2 percent to the 1973 gross national product, Mr. Kauper next came up with $80 billion. In October of last year, however, Dr. Scherer admitted in an article published in "Barron's National Business and Financial Weekly" that he "threw scholarly caution to the wind" in reaching the original figure. Yet, we continue to see the resulting Kauper estimate quoted authoritatively, even in the Congressional Record as support for proposed legislation.

You must remember that the preamble of any statute provides the philosophical frame of reference in which the courts will approach the interpretation of the substantive sections of the statute. How can this distinguished body subscribe to the language of subsections 2–3 and 5 of the findings and expect any court to respect the Congress. Where is the solid factual evidence to support such findings. It does not exist. All you have is a series of disputed hypothesis put forward by a small group of economists. Are not the disparate views being expressed by the whole economic community on how to extricate the economy from its present plight enough to convince you that perhaps you ought to change the heading of subsections 2–6 and 3–54 to "tentative hypothesis?"

It has been asserted, with some justice, that the exaggerated product claims of some American businesses are partly responsible for the mood of suspicion and distrust which pervades our community today. It is a sad fact that public opinion polls reflect a generally low level of confidence in business institutions.

And it is likely that overstatement is similarly a major contributory cause. Leading the public to think that this bill or anything like it will reduce inflation is just another case of gross, and perhaps careless, overstatement.

Our purposes at these hearings is not to criticize this policy commitment, but merely to note it is a fact. The Federal Government

actively creates, protects, nurtures, and subsidizes what is called "collective bargaining" by employees for the express purpose of obtaining higher returns than one would get in a competitive market.

Any proposal to abridge the civil rights of a substantial body of citizens, in this case, the businessmen whose interests the Chamber represents, should at least be premised on some showing of necessity. There is no such showing as to the antitrust laws. Consider the tools available to the prosecuting authorities and their colleagues of the treble damage bar. Potential antitrust defendants face a battery of weapons that are exceptional in our legal system.

They are subject to prosecution by two entirely independent agencies of Government, with overlapping jurisdiction, the Department of Justice, and the Federal Trade Commission. If they are sued by the Department of Justice, they frequently must defend parallel civil and criminal cases; if they prevail in one they still can lose the other.

If they are sued by the Federal Trade Commission, their case is heard by the very body which decided to bring the complaint in the first place. The findings of that body, which thus wears two hats in the proceeding, are then given extraordinary deference by reviewing courts as expressions of administrative expertise.

We know of no evidence that violations of the antitrust laws are either serious or widespread. The Antitrust Division regularly investigates the complaints it receives; and wherever there is evidence of violation, it proceeds by criminal or civil action.

The treble damage bar has been growing in numbers and in the intensity of its activity. The effects of long-continued and successful conspiracies which raise prices and generate excess profits can be rarely concealed. They become obvious to customers, potential competitors, and to others in the industry. They require the participation of too many individuals to remain a secret for long, especially now that treble damage claims have been made so rewarding.

I will now turn to Mr. Wilson, who will speak to titles II, III, and IV.

[The following is an additional statement of Mr. Wilson submitted subsequent to his oral testimony which appears on p. 157.]

Supplemental Statement of J. Randolph Wilson

OPENING COMMENT

My name is J. Randolph Wilson, and I am appearing on behalf of the U.S. Chamber of Commerce. I want to reiterate Mr. Riehm's comment that we appreciate the courteous cooperation of the Subcommittee Staff in arranging for our appearance.

I am a partner in the Washington law firm of Covington & Burling. I have been asked to testify on behalf of the Chamber because of my membership in the Chamber's Antitrust and Trade Regulation Committee and because of extensive experience in private practice under the Federal antitrust laws.

My comments on S. 1284 will be limited to Titles II, III and IV—which deal with the Antitrust Civil Process Act amendments, the FTC Act amendments, and the parens patriae proposals. The Chamber has no quarrel with many of the objectives in these proposals, but we do foresee several problems. However, I want to emphasize that the Chamber is not opposing S. 1284 because of any inherent opposition to antitrust. On the contrary, the Chamber endorses competition as the basic guideline for our nation's economy, and it likewise supports effective enforcement of antitrust to maintain a competitive economy. So, it follows that the Chamber likewise favors effective antitrust tools.

What troubles the Chamber about this bill divides into two main areas: First, the procedural provisions of the bill appear to tip the scales so much in favor of the prosecutor and treble damage plaintiff—that defendants would be denied the procedural safeguards which the courts have carefully created and the Federal Constitution usually requires. The second area of concern involves the parens patriae proposal—to extend antitrust damage actions far beyond injuries to business and property in the competitive market place—and to inject antitrust into areas of Government, such as taxes and welfare benefits, where we respectfully suggest antitrust treble damage suits have no role to play.

TITLE IV: PARENS PATRIAE AMENDMENTS

Turning first to parens patriae, these provisions in S. 1284 are aimed at two entirely different questions. One is a *class action question,* and the other is the so-called *"general economy"* question, that is, whether antitrust treble damages should be expanded beyond injury to a person's business and property—to include damages to a State's general economy.

The class action question resolves around those cases where members of the class are *great* in number, but their individual claims are *small* in dollars. Proponents of this legislation contend that recent court rulings—dealing with notice and proof of damages—created two obstacles which will thwart effective relief under existing class action procedures.

In these oral comments, I shall focus briefly on four separate questions: First, has effective relief in fact been thwarted? Second, is it possible to eliminate the two asserted obstacles without violating Constitutional safeguards? Third, is it possible to eliminate the duplicative recovery problem inherent in permitting recovery of damages to the State's general economy? Fourth, is it practical or wise to *compel* the Federal courts to entertain massive class actions—to achieve compensation to consumers amounting to only $1 or $2 per person—where the trade-off is to tie up the courts for years. Put another way, are these other goals which would be more *achievable* and more likely to yield effective antitrust enforcement for the few cases that fall into this category?

Recent court rulings on proof of damages have rejected the fluid recovery or pot-of-gold concept of damages for class actions. The courts have also required *individual notice* to absent members of the class identifiable through reasonable effort. These are said to be two major obstacles—which will improperly prevent recovery in antitrust actions where the class is large—and individual claims are small. We disagree. As indicated in our written statement, it is by no means clear that existing class action procedures are inadequate. For example, in the pending *Frito-Lay* case involving alleged overcharges for potato chips, the ocurt has only recently authorized the parties to proceed with a settlement—under which all consumers will receive compensation. In addition, some of the asserted deficiencies appear to have been self-inflicted by over-zealous treble damage plaintiffs. For example, in his concurring opinion in the *Eisen* case, Mr. Justice Douglas suggested several alternate procedures—that should enable the plaintiffs to obtain recovery under existing procedures.

In any event, the Chamber suggests that *if* there is a real class action problem, a more simple solution would be legislation that would remove any disability of a state attorney general—to sue as representative of a class of injured consumers. Such disability arises under existing rules where a state has not purchased the products involved in an unlawful overcharge, because the state would not be a member of the class and hence could not sue as a class representative. Such disability could easily be eliminated by legislation far more simple than the parens patriae proposals, and the Chamber of Commerce would have no objection.

As S. 1284 now stands, however, it attempts to deal with the perceived class action problem by legislatively eliminating the court rulings on notice and damages. Moreover, while the alleged problem is based on assumed price overcharges of consumers, S. 1284 goes far beyond the alleged problem and would eliminate notice and proof of individual damages for *all* types of antitrust violations—including the most esoteric Robinson-Patman violation.

The bill would eliminate the notice requirement—established in the Supreme Court's 1974 *Eisen* opinion—that "individual notice must be provided to those members who are identifiable through reasonable effort." Although primary emphasis was placed upon Rule 23, the Court's opinion quoted with approval—both the Advisory Committee Notes and earlier Supreme Court opinions—which state unequivocally that such notice is "mandatory" in order to "fulfill requirements of due process." We recognize that one can nevertheless debate whether or

not the notice provisions in S. 1284 are constitutional. No one, however, could seriously argue that there is no constitutional question. And no one can doubt that this will provoke much litigation.

The courts have uniformly rejected the so-called "pot-of-gold" or fluid recovery concept—which is based on estimating damages "in the aggregate"—without proof of *any* individual claims. S. 1284 would overturn these court rulings and permit such estimated aggregate damages. This too would raise serious constitutional questions. One court has said that the averaging—inherent in the aggreagte damages concept—would violate due process requirements. Moreover, the Supreme Court has ruled on many occasions that the Constitution guarantees him and to cross-examine adverse parties. The Constitution likewise guarantees a jury trial on all issues of fact, including issues on damages. Under S. 1284, no jury would ever consider any individual claim—only the vague concept of estimated aggregate damages.

At the very least, both the notice and damages provisions of the bill raise serious constitutional questions—which would require lengthy litigation to resolve. The Chamber respectfully suggests that whatever might be the scope of the class action problem, the proposed solution is excessive.

The third question concerns the duplicative recovery problem. Here, the Chamber commends the efforts of the drafters of this bill to try to solve this problem. However, this is an extremely complex matter—and we join in Mr. Kauper's comments—that it will be virtually impossible to separate the damages recoverable under existing law—from those which would be recoverable under the general economy provision. This feature in the bill could result in penalties far in excess of any amount that could reasonably be assessed for the conduct involved.

This leads to the fourth question—as to whether it would be wise to *compel* the Federal courts to entertain all class actions for compensation for antitrust claims—however small they might be—and irrespective of manageability burdens imposed upon the courts.

In my written statement, there are several references to a Class Action Study—prepared in 1974 by the Staff of the Senate Commerce Committee. That Study dealt with the same problem which generated the parens patriae proposals—that is, class actions where the members are great in number and their individual claims small in dollars. The Study concluded, however, that this type of class action problem is encountered in only a *few cases*—and these cases present a problem because they are "difficult or impossible" to manage by the courts. For this reason, the Study urged Congress to "accept the fact that individual relief is not feasible in all class suits."

A good example is the recent *Hotel Telephone Charges* litigation. There, the plaintiff's attorney deliberately structured his lawsuit to include over 600 defendants and millions of plaintiffs. The Ninth Circuit criticized the plaintiff's attorney because this "ensured that the litigation would be intolerably time-consuming" and would actually "consume decades of judicial time", whereas the alleged individual damages would be only $2.00 per person. The policy question is obvious. Should the Federal court devote decades of judicial time in pursuing a class action where individual recovery may be only $1.00 or $2.00?

Of course, everyone—including the Chamber—agrees that it is a valid policy to search for some means to return the $2.00 to the overcharged consumers. Yet, one must not loose sight of the equally valid policy—of ensuring the defendant an opportunity to prove that there was *no overcharge*, or that many individuals were overcharged only 25¢ rather than $2.00. In dealing with a class of millions, the difference between 25¢ per person and $2.00 per person is substantial. The Chamber opposes S. 1284 because its procedures would deny defendants a fair opportunity to defend themselves. Instead those procedures seem to assume that the defendant is always guilty.

There is also the policy of *not* overburdening the courts—with unmanageable lawsuits. The Chamber believes that existing procedures are adequate to yield compensation whenever the class action is *manageable*. No new statute—purporting to authorize unmanageable lawsuits—can somehow transform them into manageable cases.

For the *unmanageable* case, we believe that the wiser policy should be oriented toward *punishment* and *elimination of unjust enrichment*—rather than compensation. The new antitrust penalties established by Congress last year should be entirely adequate for both purposes—punishment and elimination of unjust enrichment—and should be given a chance to work. Companies are now subject to fines up to $1 million for each offense, and individuals are subject to felony charges and upon conviction to three years in jail. Courts, in exercising their discretion in

imposing such fines and penalties, could obviously take into account whether the violation involved one of those few cases where compensation of the consumer is impractical. In that situation, the courts would be justified in imposing the maximum penalty.

TITLE II: ANTITRUST CIVIL PROCESS ACT AMENDMENTS

As to the Civil Antitrust Process amendments—the Chamber's comments can be summarized in three short points:

First, antitrust investigations are expensive. They require many hours both by lawyers and businessmen, and the investigations are frequently closed with no complaint. By vastly expanding the investigative tools of the Department of Justice, the cost to innocent companies will go up—and ultimately these costs of regulation must be paid for by consumers.

Second, there has been no demonstration that existing procedures have significantly *hampered* the Department's antitrust enforcement. The main argument of proponents seems to be that the FTC has broad investigative powers—and that it would be only proper to give the same broad powers to the Department of Justice. Yet, it is widely known—throughout antitrust circles—that over the past several years, antitrust enforcement by the Department of Justice has been strong and forceful—whereas enforcement by the FTC has been weak and ineffective. If the basic premise for these amendments is that broad investigative power is the key to effective antitrust enforcement, the past history of the Department and the FTC refutes that premise.

Third, one of the main criticisms of FTC enforcement in the past was its preoccupation with trivial matters. Several factors undoubtedly influenced that situation. Yet, it is not unreasonable to suggest that one of those may have been the FTC's vast investigative powers—which can be so easily invoked and which require so much time to complete. A year or so ago, one of the Commissioners revealed that 70% of the FTC's investigative time was totally wasted in the fruitless pursuit of nonexistent antitrust violations. By conferring the same broad investigative power on the Department of Justice, there is at least a risk of this same waste.

In sum, the Chamber suggests that the proponents of these amendments have not met their burden of showing a need for change.

TITLE III: FTC ACT AMENDMENTS

Turning next to the FTC Act amendments in Title III of S. 1284, the Chamber does not oppose a reasonable increase in the maximum daily penalties for failure to comply with the FTC subpoenas or reports. The present maximum of $100 per day was set long ago, and Congress could properly increase that amount to reflect current conditions.

S. 1284, however, goes far beyond a simple increase in daily penalties—and in so doing, the Chamber foresees at least three serious objections. For time reasons, I will comment on only one of these objections.

Before doing so, however, I would like to comment briefly on a point which appears near the bottom of page 4 of Chairman Engman's written statement to the Subcommittee. This point concerns Chairman Engman's assertion: "At present, the Commission has no sanctions for non-compliance with our subpoenas." Apparently a line, or clause, was left out of Chairman Engman's statement, because the assertion that the Commission has no sanctions for non-compliance with subpoenas is plainly wrong.

Under Section 9 of the FTC Act, the Commission has authority to initiate a summary proceeding in a federal court in any "case of contumacy or refusal to obey a subpoena issued to any corporation or other person" and to obtain a court order compelling compliance with the Commission's subpoena.

In addition, under Section 10 of the FTC Act, any person who neglects or refuses to comply "with the subpoena or lawful requirement of the Commission" is subject to criminal sanctions, consisting either of a fine of $1,000 to $5,000, or of imprisonment up to one year, or both fine and imprisonment.

Returning to our main objection to the bill, a company confronted with an FTC subpoena or special report would have only two permissible grounds for challenge—undue burden and irrelevancy. Apparently, no one could challenge a Commission subpoena on the ground that its issuance was *unlawful.* Let me give a specific example of the Chamber's apprehension. As the Subcommittee knows, the FTC's Line of Business program has been implemented through the Commission's special report powers—and everyone agrees that this particular

report is subject to the Federal Reports Act. That Act requires the Commission to submit the LOB form to the Comptroller General for his approval—on such matters as whether the data is duplicative of other data, or whether the form is appropriate to gather the desired new data. Let's assume for illustrative purposes, that the FTC flagrantly violates the Federal Reports Act—and implements a Line of Business-type program without obtaining any approval from the Comptroller General. Such action by the Commission would be totally unlawful. Yet, S. 1284 would apparently prohibit any challenge of the FTC's special report—despite the Commission's unlawful actions.

CLOSING COMMENT

I have one final comment. The fundamental strength of antitrust is found in its recognizable business fairness—which results in its acceptance both by the public at large and by the business community. It is this widespread acceptance of antitrust that enables private practice lawyers—such as myself—to give antitrust advice which is credible—and which eliminates far more potential antitrust violations than the lawsuits of the Department of Justice and the FTC. If Congress takes away the underlying fairness of antitrust enforcement, there is the real danger that antitrust will loose its almost universal credibility. The Chamber believes that S. 1284—by tipping the scales so much in favor of the prosecutor and treble damage plaintiff—could have long-range repercussions contrary to the intended effect of improving antitrust compliance.

In short, we believe that these proposals need far more analysis—and that the case for enactment at this time has not been established.

STATEMENT OF J. RANDOLPH WILSON

Mr. WILSON. In title II, S. 1284 would substantially broaden the powers of the Attorney General under the Antitrust Civil Process Act of 1962. This act created the civil investigative demand—CID—as an antitrust enforcement tool of the Department of Justice. A companion bill in the House, H.R. 39, includes similar provisions.

The national Chamber strongly endorses competition as the basic precept for our Nation's economy, and it also supports antitrust laws as the principal means to maintain a competitive economy. In short, the Chamber agrees that the Department of Justice is entitled to effective tools for antitrust enforcement.

The main argument in support of title II is a simplistic one, which can be summarized as follows: The FTC has investigative powers broader than the Department's CID authority and hence it would be entirely proper to give the Department the same powers as the FTC.

The Chamber urges that this argument is faulty in three main respects. First, it is predicated on a wholly improper comparison of the full panoply of FTC investigative powers, in the relation to the Department's CID authority alone. Such comparison ignores the fact that the Department has several powerful investigative tools, such as the grand jury process and compulsory discovery under the Federal Rules of Civil Procedure, which the FTC does not have.

When all of the Department's investigative tools are compared with all of the FTC's authority, there is reasonable equivalency for prosecutorial purposes, and the asserted need for expansion of the Department's investigative powers disappears.

The "FTC has it, so we want it" argument is also unsound in a second respect. It assumes that the needs are the same on the ground that the primary roles of the two agencies in antitrust enforcement are the same. In fact the two roles are different.

The third reason for the chamber's opposition rests on policy grounds. Experience shows that the granting of broad investigative powers to a prosecutor creates the possibilities of abuse, and in the

absence of a strong showing of need for such powers, Congress should withhold them. Moreover, experience also shows that during periods when the FTC emphasized its prosecutorial role, the Commission's vast investigatory powers may have contributed to the Commission's undue preoccupation with trivial antitrust cases. All of this suggests that the proposed amendments would be unwise.

Supporters of the proposed amendments often compare the wide range of FTC investigative powers to the more limited powers of the Department of Justice under its civil investigative demand (CID) procedure. This comparison is not justified, because it fails to take into account the other powerful investigative tools available to the Department.

For example, the sweeping investigative powers of the grand jury may be used to investigate the mere possibility of any hardcore antitrust violation, such as price fixing. The power of the grand jury process is virtually unlimited. No showing of probable cause is required.

Moreover, if an FTC investigation turns up the slightest hint of a hardcore antitrust violation subject to criminal sanctions, it is the practice and policy of the Commission to refer the matter to the Department of Justice for criminal prosecution, where the full and unlimited investigative powers of the grand jury are available.

Under the Antitrust Civil Process Act of 1962, the Department has authority to issue a civil investigative demand for documents of any person under investigation. The CID may be issued prior to the institution of a civil or criminal proceeding, that is, to determine whether to invoke the grand jury process in a criminal investigation or the broad discovery rules in any civil proceeding under the Federal Rules of Civil Procedure. No one seriously contends that the grand jury process is not adequate in criminal investigations, or that the Federal rules are defective in civil litigation.

To sum up, the Department's existing enforcement tools are entirely adequate. The argument that other enforcement agencies have certain types of investigative tools not available to the Department of Justice rests largely on the faulty premise that the Department has only the CID process.

Instead, the CID was deliberately intended to serve on a limited and supplemental function, preparatory to invoking either the sweeping investigative power of a grand jury or the equally effective discovery rules under the Federal Rules of Civil Procedure.

When all of the Department's investigative tools are taken into account, the asserted shortcomings in the Department's powers are nonexistent.

The broad investigative tools currently available to the Department of Justice are entirely adequate for effective antitrust enforcement. While the Department's CID authority may be more limited than the Commission's full range of investigatory tools, the Department has available the grand jury process, compulsory discovery under the Federal Rules, FBI investigations, and even access to the FTC's powers. There is no need for conferring more power.

For all these reasons, the chamber respectfully urges that the "Antitrust Civil Process Act Amendments" as found in title II of S. 1284, should be rejected.

In title III, the national chamber does not oppose an appropriate increase in the daily forfeiture penalty. It does oppose any concept of a mandatory minimum penalty to be imposed irrespective of whether the company has proceeded in the utmost good faith.

The more fundamental objections, however, go to the harsh and unduly punitive provisions in title III which eliminate any realistic chance to stay penalties pending a good faith challenge of the Commission's order and which appear flatly to prohibit enjoining the enforcement of an unlawful subpena.

Under existing law, the Commission's compulsory orders and subpenas may be enforced in three different ways:

A civil enforcement suit under section 9 of the FTC act, which may be initiated by the Commission immediately after any default and which provides the Commission with prompt and complete relief with no delay whatsoever.

A suit for forfeitures or penalties of $100 a day, starting 30 days after the Commission has served notice of default.

A criminal proceeding for willful refusal to comply, punishable by a fine of $1,000 to $5,000, or by imprisonment of up to 1 year, or by such fine and imprisonment.

The Commission may invoke any, or all, of these enforcement procedures. The empirical evidence shows that the existing enforcement procedures are entirely adequate, and in many respects severe.

Moreover, under existing law, the Commission proceeds with enforcement of its typical subpena under summary procedures which are commenced by a simple order to show cause and which are disposed of quickly in a manner comparable to a summary judgment motion.

In sum, the existing law for enforcement of FTC subpenas is entirely adequate and perhaps unduly severe. There has been no showing of any need for further punitive measures to enforce such subpenas or special orders.

Turning next to challenges of the merits of an FTC subpena, S. 1284 once again would impose criteria far more rigid and harsh than existing law. Under S. 1284, the courts would be precluded from enjoining enforcement of any subpena or special report except after the party has demonstrated that compliance is unduly burdensome or is not reasonably relevant to the Commission's inquiry.

The main thrust of title III is plainly designed to drastically curtail, if not eliminate, the right to challenge an FTC subpena. If such procedures were proposed in any context other than antitrust, civil libertarians would be up in arms objecting to overreaching incursions of governmental procedures and to the obvious opportunities for abuse of power.

Senator HART. Excuse me, Mr. Wilson. I do not like to interrupt, but I must get to the other meeting. We will take a short recess, and wait the arrival of Senator Abourezk.

The hearing will stand in recess at the call of the Chair.

[Whereupon, a short recess was taken.]

Senator ABOUREZK. The committee will come to order. Will you please identify yourselves, so I will know who you are?

Mr. RIEHM. I am J. W. Riehm, and to my right is Mr. J. Randolph Wilson. Mr. Wilson was testifying concerning titles II, III, and IV, and then I will have a short time on titles V, VI, and VII.

Senator ABOUREZK. Proceed.

Mr. WILSON. The parens patriae provisions in title IV of S. 1284 would amend section 4 of the Clayton Act so as to allow the attorney general of each State to bring antitrust actions, for both treble damages and injunctive relief, on behalf of all persons residing in the State and of all political subdivisions of such States.

Title IV is similar to the bill introduced in the House.

Senator ABOUREZK. I understand that the Rodino bill was reported out this morning.

Mr. WILSON. In Title IV, the proposed bill would amend the Clayton Act by adding several new subsections to section 4 which provides for antitrust treble damage suits by private persons and single damage suits by the Federal Government.

The essence of title IV is found in provisions authorizing three new types of treble damage lawsuits by a State, amending class action procedures to permit publication notice rather than actual notice, and adding an unprecedented rule on proof of damages.

More specifically, the bill provides for three types of treble damage lawsuits by a State:

1. As parens patriae for damages sustained by all persons residing in the particular State, or an alternative class action with respect to such damages where the interest of justice so requires.

2. As parens patriae for all damages to the general economy of that State or any political subdivision thereof.

3. On behalf of any or all political subdivisions with respect to damages sustained by such subdivision.

Eliminating existing procedures in class actions designed to give actual notice to absent parties, and substituting in those lawsuits created by the bill imputed notice through publication of legal notice as prescribed by local State statute or rules for ordinary lawsuits.

Permitting recovery of aggregate damages based on statistical sampling or other reasonable system of estimating aggregate damages, without proof of any individual claims, which would permit use of the much criticized fluid recovery or class action based on the "pot of gold" concept.

In addition, the bill also includes other procedural provisions. One would require the Attorney General of the United States to notify any State attorney general of the latter's right to bring an action of the type outlined above, and further authorizes the Attorney General of the United States to bring such action himself should the State attorney general decline to do so.

The bill would also authorize any State, with respect to a federally funded State program, to recover tremble damages for the entire amount of overcharges or other damages, with the Attorney General of the United States having the right to sue for treble damages on behalf of any State that declines to bring such action after notice from the Attorney General of the United States.

Senator ABOUREZK. May I ask, do you know of any instance where the Federal Trade Commission has intended to use that procedure?

Mr. WILSON. Yes. They have used it constantly.

Senator ABOUREZK. How rapid is that summary procedure? How quickly does it come about?

Mr. WILSON. The Federal Trade Commission summary procedure is invoked, by what is known by lawyers, as an order to show cause.

Most of the courts regard this as, in effect, a motion for summary judgment. The Federal Trade Commission insists that this is the proper procedure. Many of the courts have endorsed it and it's——

Senator ABOUREZK. My question was, how rapid is that procedure?

Mr. WILSON. Well, it can move as rapidly as the Federal Trade Commission lawyers will want to move it.

Senator ABOUREZK. In your experience, if a Federal Trade Commission lawyer filed an enforcement action in Federal district court, under this process, what is the length of time, give me the shortest length of time and the longest length of time it has taken if you know, of the time that has allowed this procedure to be completed and a subpena to be enforced?

Mr. WILSON. I will answer that by my own personal experience. In one case, it required approximately 1 month. In another case, the subpena matter was transferred, at the suggestion and agreement of both parties, including the Federal Trade Commission, from the Federal district court in the District of Columbia to the Federal court in the southern district of New York.

Senator ABOUREZK. How rapid was that? How long did it take for that to——

Mr. WILSON. Well, I am trying to give you the two extremes, Senator.

Senator ABOUREZK. Pardon?

Mr. WILSON. I am trying to give you the two extremes, here. That——

Senator ABOUREZK. But when you said it was transferred, you did not give a period of time or I did not hear it.

Mr. WILSON. Well, the transfer took place rather rapidly. As I recall, the district court in the District of Columbia, transferred the case to—I am sorry, let me rephrase that.

Senator ABOUREZK. You did not answer as to how long it took to enforce the subpena.

Mr. WILSON. Well, the subpena, you see, Senator, is issued by the Federal Trade Commission.

Senator ABOUREZK. How long did it take them to enforce the subpena?

Mr. WILSON. In the case that I am now describing, that where there was an extensive period of time, it may have been—and I am relying only on recollection—10 to 12 months. Incidentally, I can say the court agreed with half of the objections to the subpena.

Senator ABOUREZK. The Federal Trade Commission gave the committee staff a list of efforts at enforcing subpenas. In the *Curtiss-Wright Corporation* case, it took 8 months and 16 days; *Empire Builders*, 2 months, 2 days; *Lehigh Portland* case, 7 months, 6 days: the *Barry Distributing* case, 3 months, 15 days; *Koppers Company*, 7 months, 14 days.

The shortest one here is 2 months and 2 days. The longest one on this list is 20 months. In effect, the Chairman of FTC did leave something out. The Commission does have sanctions which, because of the time circumstances involved in going into Federal court and having to be fought every step of the way on a subpena, in effect, really, are not much sanction power. And, FTC probably ought to have something different, I would say.

Mr. WILSON. Well, Senator, in reading those statistics or in evaluating those statistics furnished by the Federal Trade Commission, you should take into account that the vast, overwhelming majority of FTC subpenas are complied with, without any court enforcement.

You are looking at just the tip of the iceberg. You should take into account the many cases where the courts have ruled that the FTC's subpena was wrong.

Senator ABOUREZK. Yes. Well, we are concerned about the cases where they have not moved them right away—such as natural gas.

Mr. WILSON. Well, I would hope you would not lose sight of the other factors.

Senator ABOUREZK. In the natural gas conspiracy case, I am advised by counsel, the enforcement of the subpena is now in its second year of court process.

That is a long time for the enforcement of a subpena.

Mr. WILSON. Well, since you are concerned, and I think it is reflected as a concern of the business community, is based on the assumption that the Federal Trade Commission is always right and that the company is always wrong.

And if you will examine the cases that have gone to court, you will see that that is not true.

Senator ABOUREZK. I have some prepared questions I would like to ask you on title II.

Mr. WILSON. All right.

Senator ABOUREZK. The chamber opposes enactment of title II, raising the specter of abridgment of the civil rights of businessmen, the possibility of abuse of the prosecutorial arm of Government, and the lack of an adequate showing that existing law confers inadequate investigatory powers on the Department of Justice.

Now, Mr. Wilson, can you provide any examples for the subcommittee of abuses by the Department of Justice, in utilizing the present Antitrust Civil Process Act authority?

Mr. WILSON. I think I have been misquoted, Senator. I do not recall any such statement that the Department of Justice has abused present processes in my statement.

Senator ABOUREZK. You talked about the possibility of abuse. That was the question, not abuse itself.

Mr. WILSON. Well, I am talking about—yes, our statement does mention the possibility of abuse.

Senator ABOUREZK. And what is that based on?

Mr. WILSON. Well——

Senator ABOUREZK. Are there examples where the Justice Department has abused that process?

Mr. WILSON. It does not have the process now, so it could not possibly have abused it.

The problem is this——

Senator ABOUREZK. There is a present Antitrust Civil Process Act.

Mr. WILSON. Yes.

Senator ABOUREZK. That is where they have the authority. Have they abused that?

Mr. WILSON. No.

Senator ABOUREZK. All right. So you do not really have any basis to base your fears upon.

Mr. WILSON. Well, let me respond in this fashion. As I understand the provisions of title II, it would, in effect, give the Department of Justice a precomplaint authority to conduct interrogations of the same type as a grand jury.

And, in fact, one of Mr. Nash's questions, to Mr. Nader, earlier this morning, assumes that it would be entirely proper under this bill for the Department of Justice to conduct a criminal investigation, under this type of procedure.

I assumed that, Mr. Nash, because you asked Mr. Nader to hypothesize a price conspiracy, which, as all of us know, is normally prosecuted by the Department of Justice criminally.

My worry is that the Department of Justice would use these procedures for criminal enforcement of the antitrust statute, without going through the grand jury process.

After all, the grand jury process is intended to act as a buffer. While the Department of Justice, frequently, and probably usually, persuades the grand jury to go along with a proposed indictment, it does not always do so.

Senator ABOUREZK. My impression of the grand jury process is that it does not act as a buffer, it acts as a tool of the prosecutor. That has been my knowledge of it.

Mr. WILSON. Well, nonetheless, the prosecutor must still get the votes of the grand jurors to issue an indictment.

Senator ABOUREZK. Right.

Second, Assistant Attorney General Thomas Kauper testified yesterday that the existing Antitrust Civil Process Act is inadequate, in that in addition to repeal of the Fair Trade laws, the administration's No. 1 antitrust legislative priority is enactment of title II to S. 1284, with modifications suggested in his testimony.

In investigating possible violations of antitrust laws, it seems eminently reasonable that the taking of oral testimony could greatly facilitate the investigation. Likewise, if the third parties possess relevant evidence, I would be interested in your rationale as to why the Department should be prohibited from obtaining that evidence?

Mr. WILSON. Well, once again, as I have indicated in my statement here, experience shows that if the Government official is given broad investigative power, it is likely to be used.

Experience has shown, also, that the Federal Trade Commission, which already has this power, wastes 70 percent of the time. Consequently, it is a fair assumption, it seems to us, that there is at least the risk that this could occur at the Department of Justice, and it would increase the cost of this type of regulation, because the company would be involved in more lengthy, more costly, antitrust investigations, many of which involve wholly innocent practices.

Senator ABOUREZK. You can go ahead, if you wish.

Mr. WILSON. Well, I was about to summarize one of the objections which the chamber has to the proposed FTC Act amendments, because, as I indicated, title III of this bill would go far beyond a simple increase in the daily penalties for noncompliance with an FTC subpena.

Under this bill, as we read it, a company confronted with an FTC subpena, or special report, would have only two permissible grounds for challenge, burden and irrelevancy.

Apparently no one could challenge a subpena, or special report, on the ground that its issuance was unlawful. Let me give a specific example of the chamber's apprehension.

As the subcommittee knows, the FTC line of business program has been implemented through the Commission's special reports powers. And everyone agrees that this particular report is subject to the Federal Reports Act.

That act requires the Commission to submit the LOB form to the Controller General for his approval, on such matters as to whether the data is duplicative of other data called for by the Federal Government, or whether the form is appropriate to gather the desired new data.

Now, let us assume, just for hypothetical purposes, that the FTC flagrantly violates the Federal Reports Act and implements a line of business type program, without even going to the Controller General. Such action by the Commission would be unlawful.

Yet, this bill would apparently prohibit any challenge of the FTC's report, despite that unlawful act.

Mr. NASH. If the Chair will permit this question, FTC's counsel advises the subcommittee staff that in its view, the orderly administration and efficient operation of the Commission warrants a single proceeding, in a single place, to review the efficacy and legality of an FTC order.

And they point out that, for example, in the line of business proceeding, a multiplicity of lawsuits to enjoin the Commission has been, and can be, filed throughout the country, with the Commission jumping around, litigating the very same issue before different judges.

And that the reason for the importance of title III to the bill, would be not to bar, or take away, any right of the defendant to challenge the order, but merely to consolidate into a single proceeding so that defendants served with subpenas, or special orders, could raise any legal matter in defense at the time the FTC filed a subpena, or special report, enforcement action.

Do you have any problem with that concept, assuming that any technical deficiencies in the bill would be redrafted to carry that through?

Mr. WILSON. Well, I would comment, Mr. Nash, again, that I do not believe the bill, as presently drafted, would permit the court to refuse enforcement of a special report, on the ground that the Commission's issuance of the report was unlawful.

So that if that problem were removed, by revising the bill, obviously we would no longer have an objection on that score.

Turning, next, to the other problem that you have mentioned; that is, the possibility of multiple parallel lawsuits in the various courts, we already have a procedure to deal with that, the multidistrict panels.

I do not see why any special legislation is needed on that score. The line-of-business litigation, that you have mentioned, has provoked only two cases; one, in the southern district of New York, before Judge Winefeld, and another in the District Court of Delaware, before Judge Schwartz.

To the best of my knowledge, the Federal Trade Commission, itself, has not tried, under existing procedures, to consolidate those two cases.

Well, I have just one final, closing comment. The fundamental strength of antitrust, I believe, is found in its recognizable business fairness. And this results in its acceptance, both by the public at large and by the business community.

And it is that widespread acceptance of antitrust that enables private practitioners, such as myself, to give antitrust advice with credibility and acceptability.

It will—and I should say this. I think that the antitrust advice of private lawyers probably eliminates more antitrust violations than the lawsuits of the Department of Justice or the FTC.

If Congress takes away this underlying fairness of antitrust enforcement, there is a real danger that this feature of antitrust universality of acceptance would be lost. And the chamber of commerce believes that this bill, by tipping the scales so much in favor of the prosecutor, and the treble-damage plaintiff, could have long-range repercussions, contrary to the intended effect of improving antitrust compliance.

Thank you, very much, for permitting me to appear here.

Senator ABOUREZK. Thank you, Mr. Wilson.

Mr. RIEHM. Senator, if I may take a few moments more to comment briefly, with respect to titles V, VI, and VII.

While title V is headed "Pre-Merger Notification," it goes much beyond requiring corporations contemplating mergers to notify the FTC and the Assistant Attorney General. It requires the filing of information of undefined scope, bearing on the legal propriety of proposed mergers.

And it gives the FTC, and the Assistant Attorney General, virtual licensing power over the proposed merger. Its impact is not limited to mergers, in its present form. And I suggest, as I have said on previous occasions, that this is an example of rotten draftsmanship.

It covers any sale of assets, which, literally read, could be from inventory, by a person engaged in commerce to another person engaged in commerce. And you may remember that Mr. Kauper expressed concern on this point yesterday.

It also grants powers to prescribe accounting methods. There is obviously an inherent problem in drafting a Pre-Merger Notification Law.

Section 7, like the present proposal, applies to acquisitions of assets, but with the qualification that the acquisition must substantially lessen competition; a qualification which rules out ordinary, commercial transactions.

But the present proposal wants to leave the FTC and the Assistant Attorney General free to make their own determination of whether or not any transaction, whatsoever violates section 7.

There is no way, we can see, to give them the premerger notification they want, without authorizing them to demand, as the bill does, advance notice of any commercial transaction.

Now, as I said, that may be a drafting error, but I think you are going to face a serious problem in dealing with it.

The views of the chamber, on premerger notification, are influenced by the belief that the great majority of merger-type transactions are economically healthy. They reflect the process of business entry and exit vital to the free enterprise system, and should not be subject to Government intervention, except when in the language of section 7 they result in substantial lessening of competition.

The proposed legislation incorrectly assumes the existence of a merger problem. According to the latest authoritative figures of W. T. Grimm & Co., of Chicago, announced last month, mergers and acquisitions in the calendar quarter ended March 31, decreased by 34 percent over the comparable 1974 quarter.

And more importantly, this was the ninth successive quarterly decrease in merger activity.

Senator ABOUREZK. Mr. Riehm, does not that merger activity rise and fall with the rise and fall of the stock market?

Mr. RIEHM. To some extent this is true, Senator, but the interesting point of it—and what I was just going to suggest—is that we have seen a very considerable change in the pattern of these things in recent years.

The Grimm report indicated that during the first quarter of 1975, 290 of the 575 mergers involved the sale of a product line, a division, or a subsidiary of a parent company. In other words, the kind of things in which an operation—as we went through the declining economic circumstances found—was not viable and it should be disposed of to somebody who could operate it more profitably.

And this takes us to the point of saying, Is this necessary restraint that comes in this premerger notification worth the interference with the relatively free exit and entry that goes on?

Things have not changed significantly since the days of the Celler premerger notification proposals of the late 1950's and 1960's. And for that reason, we do not see why, having gone through all of the hearings and discussions and not having enacted that legislation, it should be brought up again.

Now, I can recognize that there are those arguments made by the people who say that divestiture is not the answer, and we heard something of that yesterday. And I would be the last one to say it is easy to unscramble eggs.

But under the circumstances, divestiture does work. I need only point to one perfect example where it did, and that was the *Clorox* case. And insofar as the arguments were made, and the comments made here this morning about the length of time it takes to accomplish divestitures, I think if anyone is going to look carefully at the statistics that were suggested should they be developed, should take into account, not the foot dragging by business, but the demands and changes in proposals that have come forward constantly from the Government, when various forms of divestiture activity have been offered by the party that has been charged with the divestiture.

If I may turn now to the nolo contendere provisions, title VI, briefly.

I simply want to suggest that despite the appearances, what is really proposed is the elimination, in practical effect, of the alternative of entering a plea of nolo in criminal antitrust proceedings.

What we must remember is that nolo is not a loophole. It is an important tool, just as important as its civil equivalent, the consent decree, for the pragmatic and efficient enforcement of the antitrust laws.

No defendant has an automatic right to plead nolo. He actually is faced with the acceptance or the rejection as a matter of discretion with the court, as provided by rule 11 of the Federal Rules of Criminal Procedure.

And such pleas, for example, were rejected in the so-called electrical cases. Again, Mr. Kauper talked of his concern, yesterday, as to whether or not the gain was worth the candle in this respect, and we concur in the views expressed by Mr. Kauper.

Finally, turning to the last miscellaneous provisions in title VII, we believe they are unnecessary and they are not really an improvement as implied by the bill's title.

Section 701 would strike out the words "in commerce," wherever the term appears in the Robinson-Patman Act, and in sections 3 and 7 of the Clayton Act, and insert in lieu thereof, the words "in" or "affecting" commerce.

We question the wisdom of expanding the reach of Robinson-Patman, at a time when its provisions have been subject to persuasive criticism. Economists are becoming increasingly convinced that Robinson-Patman is anticompetitive, limiting competition rather than promoting its efficiency.

The act has been strongly criticized by two recent Presidential Commissions and was, again, criticized in the Annual Report of the Council of Economic Advisers, transmitted with the Economic Report of the President, in February.

We submit that the Congress should undertake a thorough reevaluation of Robinson-Patman, before enacting legislation which would significantly expand the reach of that statute to what is essentially intrastate conduct.

The present jurisdictional reach of the Clayton Act is not clear. Expansion of the reach of the Clayton Act raises the question of whether the amendment would encourage private litigation under Federal antitrust laws, that, again, would more properly be filed in State and local courts, under State and local laws, governing local trade practice.

Turning to section 702, it would add a new section to the Clayton Act, to provide expeditious handling of civil actions brought by the United States for injunctive relief, if the Attorney General certified the case as complex.

The Federal judiciary has already adopted special procedures for handling complex antitrust cases expeditiously, under the Manual of Complex Litigation, which has been developed over many years of experience.

And any statutory directions, concerning the handling of complex antitrust cases, should take into account its suggested procedures.

No special authority is required to permit the Attorney General to seek an expedited trial in cases of unusual public importance, where preferred treatment is warranted.

Section 702 would also permit the appointment of special masters and so on, to assist the trial judge in complex cases.

This provision is unnecessary in view of the clear, existing authority for district judges to use masters and experts.

When I turn to 703, you will note that it adds a new section that would permit impositions of sanctions on any party or person in privity with such party, who failed to comply with a court order to furnish discovery, evidence, or testimony, on the grounds of foreign law prohibiting compliance.

This proposal seems unnecessary, since it does not provide any power or authority beyond the court's existing power and authority to impose sanctions, under rule 37 of the Rules of Civil Procedure.

And since 703 does not purport to provide guidance as to how the court should deal with difficult constitutional and international comity issues involved where discovery is prohibited by foreign law, and does not provide any authority the court does not already possess, we submit that its adoption would be inappropriate.

Senator, if you will forgive an old professor for lecturing the committee, I want to suggest that in summary, S. 1284 should not be enacted.

What the Chamber sees here is a grab bag, or a hodge-podge of legislation, the primary implications of which have been barely analyzed, and the secondary and tertiary implications really unexplored.

We fully appreciate your concern and desire to enact legislation to make this a better country for all of us, but beware of simplistic solutions proposed by angry young men who believe they have found the everlasting truth.

Be aware, also, of the dreams and wishes of regulators and enforcers, who always have a Christmas list they want you to enact.

Senator ABOUREZK. Excuse me. You are not referring to Senator Hart as being an "angry young man"? [Laughter.]

Mr. RIEHM. Well, I would have to let the Senator speak for himself. He is a very young, able, and aggressive individual, and I would be the last to call him an old man, sir.

Yours is the unenviable task of adding judgment and mature perspective to the special pleadings of your staff specialists, the angry young men who characterize themselves as public service advocates, the regulators and enforcers, and yes, even the business community.

Your ultimate task is to weigh the prospective benefits of the bill against the economic costs. And when you do, I believe you will find it comes up wanting and, thus, should not be enacted.

May I close with a quote from a recent remark by Jean Monet, that great architect of postwar Europe, who said, "You have to mend before you can construct. You have to define the problems carefully; face them, no matter how hard, and then work away at them, patiently and steadily. You can't settle everything at once."

We thank you, and we would be happy to answer any other questions you gentlemen might want to ask.

Senator ABOUREZK. Thank you.

Mr. NASH. Mr. Riehm, you point out that the same penalty may be adjudged upon a plea of nolo contendere as upon a plea of guilty or a verdict of guilty.

That is our understanding of the law as well.

Mr. RIEHM. Yes.

Mr. NASH. In fact, the weight of authority is that a plea of nolo is the equivalent of the guilty plea for all purposes.

Mr. RIEHM. Right.

Mr. NASH. In your judgment, why should an artificiality of the Clayton Act, therefore, give prima facie effect to a guilty plea, but deny it to a plea of nolo contendere?

Mr. RIEHM. Well, I think, Mr. Nash, this goes to the basic element of economic cost. We have talked, and we have had other people testify

on this general subject before; and, basically, what we are concerned with here is the question of whether or not this will really do anything.

In the long run, you must recognize that there are problems of proof of damages as well; and that which is covered by the nolo may not be enough to protect the interest of the civil plaintiff in recovery of damages.

Yet, it may be enough to prompt the defendant to say, "If that's how delicate the balance is, we might as well go ahead and fight the thing all the way, with the hope that we will win the criminal action."

It's a tough, difficult judgment, and I think Mr. Wilson may want to add something to that.

Mr. WILSON. I would like to add just one additional comment. It seems to me that the equating of nolo with guilty on the criminal sanction side, as the premise for equating nolo and guilty on the prima facie evidence question, is not entirely applicable.

The reason is this. It assumes that there is only one gradation of antitrust violation. Experience shows that there are all sorts of gradations, and this is the way the courts have exercised their discretion in whether or not to accept a nolo plea.

The only difference between a nolo plea and a guilty plea is the one that Mr. Nash pointed out, and that is the prima facie evidence effect that applies to a guilty plea but does not apply to a nolo plea.

The Chamber's position is that there are cases where it is proper to plead nolo but improper to give prima facie evidence for treble damage cases, because of the gradation of antitrust offenses that are available, and the Congress should not take away the discretion that courts exercise on that issue at this time.

Mr. NASH. Thank you very much. I have no further questions, Mr. Chairman.

Senator ABOUREZK. Mr. Chumbris?

Mr. CHUMBRIS. Thank you, Mr. Chairman. There is another significant difference between nolo contendere and a plea of guilty.

We have the testimony of Judge Bromley in our 1966 hearings, where he pointed out that many businessmen, especially small businessmen, who were faced with an indictment, and they had a choice. They had a choice of pleading guilty, a choice of going to trial, or a choice of nolo, and their position was that, "I'm not guilty, but if I go to trial, I'm going to have to spend $250,000 to $400,000 or $500,000"—and we have testimony on this in other hearings during that era—"to defend myself." "Not only that, but it would disrupt my offices and staff if there was a trial, and other inconveniences, and rather than go through that, I will take a nolo, because I knew what the consequences would be with a nolo plea."

But if he pled guilty, he would be admitting to a guilt that he felt that he was not guilty of.

Mr. WILSON. I agree with that comment, Mr. Chumbris.

Mr. CHUMBRIS. I have nothing further, Mr. Chairman.

Senator ABOUREZK. I want to thank all of you for your testimony. Nobody has any more questions, apparently, and we express our gratitude for your appearance here today.

Senator Hart is in a markup session, and will return in just a few minutes. Until that time, I will recess the hearings temporarily. Thank you.

[The combined prepared statement of Mr. Riehm and Mr. Wilson follows. Testimony resumes on p. 201.]

Statements on S. 1284, Antitrust and FTC Act Amendments, for the Chamber of Commerce of the United States by J. W. Riehm[1] and J. Randolph Wilson[2]

My name is J. W. Riehm. I am Vice President, External Affairs, and Secretary of Thomas J. Lipton, Inc., Englewood Cliffs, New Jersey. My colleague is J. Randolph Wilson, partner in the Washington, D.C. law firm of Covington and Burling. Both of our firms are members of the Chamber of Commerce of the United States, and we each serve on the Chamber's Antitrust and Trade Regulation Committee.

On behalf of the Chamber, I want to say at the beginning that we truly appreciate the Subcommittee's invitation to offer views on S. 1284, an omnibus bill to amend the Antitrust Civil Process Act, the Federal Trade Commission Act and the Clayton Antitrust Act. We appreciate especially the courteous cooperation of the Subcommittee staff in working with the Chamber to arrange for our appearance here today.

While we have much to say in general opposition to the many parts of this bill, we will hold our oral presentations to summaries of around twenty minutes total, as requested in the Subcommittee's invitation. Then, we will make ourselves available for dialogue. Of course, we would like to have the entire written statements incorporated in the record.

We know that is the custom, but it is especially important in the case of S. 1284. The bill is of such dimension that it would be impossible for us to touch on every issue raised by its seven titles in a summary oral presentation. Indeed, our full written statements are but partial summaries of the issues presented.

Each of the six substantive titles are actually separate pieces of legislation, and could logically be the subject of individual hearings. For example, five days of hearings by the House Judiciary Committee on a companion to Title IV (parens patriae and antitrust class actions) succeeded only in raising more valid questions than they resolved. Title I, the "Declaration of Policy", as the premise for substantive provisions to follow, excites sufficient questions by itself to be the basis of a major debate or text on advanced economics and antitrust.

A brief description of the bill's seven titles will illustrate further the enormous challenge put to business representatives in responding to its provisions—

Title I, Declaration of Policy, charges, *inter alia*, that diminished business competition and increased industrial concentration have been important factors in the ineffective efforts of government to reduce inflation and unemployment.

Title II, Antitrust Civil Process Act Amendments, greatly expands investigation powers of the Justice Department—principally by granting the Department powers to subpoena witnesses for questioning before the filing of a complaint and with a minimum of judicial supervision.

Title III, FTC Act Amendments, increases penalties for failure to comply with FTC special orders and subpoenas; and reduces rights of respondents to defend against unlawful subpoenas and orders.

Title IV, Parens Patriae, authorizes state attorneys general to sue alleged antitrust violators for treble damages on behalf of all state residents without proof of individual claims; and authorizes state attorneys general to sue for treble damages to the "general economy."

Title V, Premerger Notification, requires 60 to 90 day notice and waiting period in advance of certain merger transactions; and authorizes the government to obtain automatic preliminary injunctions against such transactions.

Title VI, Nolo Contendere, authorizes "no contest" pleas in government antitrust prosecutions to be used as evidence of violation in later private suits for treble damages.

Title VII, Miscellaneous, expands reach of Robinson-Patman Act and Sections 3 and 7 of the Clayton Act to activities "affecting" commerce; authorizes special handling of "complex" antitrust cases; and imposes sanctions on persons who decline to furnish evidence inantitrust cases on the ground that it is prohibited by foreign law.

Because of the numerous issues raised by the bill, and the relatively short preparation time, we have developed our positions in a collective way—with contributions from other committee members. Our oral presentations will reflect that division of labor. I will open by discussing the policy declaration in Title I, with attention also to Titles V, VI, VII, if time permits. Mr. Wilson, as the author of the statements on Titles II, III and IV, will follow with presentations in those three items.

Our full statement follows below.

[1] Titles I, V, VI, VII.
[2] Titles II, III, IV.

TITLE I: DECLARATION OF POLICY

I. There Is No Reasonable Prospect That S. 1284 Would Perceptibly Ameliorate Long-Run Or Short-Run Economic Problems

There is much in Title I, the "Declaration of Policy", with which no reasonable man could disagree. The Chamber emphatically endorses this initial finding that "this Nation is founded upon and committed to a private enterprise system and a free market economy." We agree that some "regulatory policies" have caused a "decline of competition." We support a policy of "effective and expeditious enforcement of the antitrust laws." Virtually every other statement in the section, however, is either inaccurate or grossly exaggerated.

The gravest error of all is the suggestion that this Act "can contribute significantly to reducing prices, unemployment and inflation." It cannot. The idea that antitrust measures or attacks on "concentration" will have any impact on unemployment and inflation can be dispelled, without intensive economic analysis, simply by viewing recent history.

This country had relatively stable prices and employment levels in the early 1960's; it has experienced severe inflation and rising unemployment in recent years. It cannot be seriously claimed that there has been a significant change in "concentration", or "decline of competition" or reduction in the vigor of antitrust enforcement between these two periods of times. What have changed are the levels of government spending and the rates at which money has been created. The attempt by government to blame industry for conditions that government itself has caused is dangerous as well as unfair.

It could be argued, of course, that the preliminary rhetoric in legislation, which will presumably be echoed in the public statements of its supporters, is not really important and that therefore accuracy is immaterial. This is a shortsighted view. Exaggerated and inaccurate claims can do a great deal of harm, since they tend to gain credence through constant repetition.

Consider, for example, a statement on August 1 of last year by Thomas E. Kauper, the Assistant Attorney General for Antitrust. In a presentation to the House Republican Task Force on Antitrust, Mr. Kauper referred to estimated consumer losses of $80 billion a year, because of "ineffective competition . . . and illegal anti-competitive conduct . . ."

Since then, this estimate has been thoroughly discredited. It began with F. M. Scherer, now Chief Economist at the Federal Trade Commission, who wrote in a book a few years back that ineffective competition costs 6.2% of the Gross National Product. Applying 6.2% to the 1973 GNP, Mr. Kauper next came up with $80 billion. In October of last year, however, Dr. Scherer admitted in an article published in *Barron's* National Business and Financial Weekly that he "threw scholarly caution to the wind" in reaching the original figure. Yet, we continue to see the resulting Kauper estimate quoted authoritatively, even in the *Congressional Record* as support for proposed legislation.[3]

It has been asserted, with some justice, that the exaggerated product claims of some American businesses are partly responsible for the mood of suspicion and distrust which pervades our community today. It is a sad fact that public opinion polls reflect a generally low level of confidence in business institutions. And it is likely that overstatement is similarly a major contributory cause. Leading the public to think that this bill or anything like it will reduce inflation is just another case of gross, and perhaps careless, overstatement.

The magnitude of the misleading claim can be illustrated by reference to a single statement in the bill, Section 102(b) says, "it is the purpose of the Congress in this Act * * * to prevent and eliminate monopoly * * * power in the economy." On its face, this statement seems eminently reasonable. However, the bulk of the consumer's dollar is spent where prices are set *above* free market competitive levels as a result of deliberate Government intervention to that end.

The main exception to the principle, of course, is that the United States is presently committed to the exercise of monopoly power by labor. This commitment is found in the enforcement of the National Labor Relations Act, as amended, and in provisions of the Norris-LaGuardia Anti-Injunction Act and the Clayton Act which declare that the labor of a human being is not a commodity. The coercive exercise of labor monopoly power has in recent years been further strengthened by government action subsidizing strikes through welfare and food stamp programs.

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[3] See for example the remarks of Senator Ribicoff on the introduction of S. 200, a bill to establish an independent consumer agency, January 17, 1975, at S. 378.

Our purpose at these hearings is not to criticize this policy commitment, but merely to note it is a fact. The Federal Government actively creates, protects, nurtures, and subsidizes what is called "collective bargaining" by employees for the express purpose of obtaining higher returns than one would get in a competitive market. Comparable collective action by sellers of goods is characterized as a cartel, conspiracy in restraint of trade, trust, or monopoly. Realistically, therefore, our national policy commitment is to the use of "monopoly power" in the determination of the returns to labor, and against the use of "monopoly power" in the determination of returns to Capital.

In terms of their respective shares of total personal income, however, labor is much more important than Capital. Salaries and wages are running at a current rate of about $769 billion a year, as compared to a rate of corporate profits of $81.1 billion a year.[4] Corporate profits average about 7% of the sales dollar; wages and salaries average about 65%. Making every allowance for the uses and abuses of statistics, and the fact that not all laborers are covered by collective bargaining agreements, the consumer is evidently paying several times as much for that factor of production in which monopoly is encouraged as he is paying for the factor of production which is affected by the antitrust laws.

Profits are the cost of Capital, they are determined competitively, and during the current recession corporate profits have fallen from an annual rate of $94.3 billion in the 3rd quarter of 1974 to an annual rate of $81.1 billion in the 4th quarter of 1974—a fall of 14%. Wages and salaries on the other hand, have risen slightly by 0.8%. Both sets of figures are in current dollars.

When wages remain stable or rise while profits go through wide cyclical swings, when organized labor prefers unemployment of the less senior work force to downward reductions in wages of workmen with high seniority, it is not surprising that "monetary and fiscal policies" are open to criticism as "ineffective" in dealing with inflation and unemployment.

We do not question that monopoly power, in the form exerted by organized labor with the explicit approval and sanction of Congressional policy declared again and again throughout this century, makes it more difficult to use monetary and fiscal approaches than it otherwise would be. What we deny is the claim that monopoly power on the business side is contributing to the problem. Those who dispute these statements might reflect on the problems of the construction industry—an industry notably "unconcentrated" on the employer side, but now experiencing rising wages in the face of reduced demand and widespread unemployment.

There is little need to dwell on the other sectors of the economy where present Congressional policy favors monopoly power. There are, for example, antitrust exemptions for agricultural cooperatives, as well as numerous industries in which prices—and indeed the right to enter business at all—are determined by government regulation and license. Nor do we wish to underemphasize the impact of cartels formed by socialist-minded foreign governments—which like OPEC are beyond Congressional writ. An unkind skeptic might indeed have some ground for asserting that public policy in the United States favors a free market, competitive atmosphere for only a small part of the economy.

In any event, Congress must face up to the limited area within which antitrust can operate and the limited expectations we can have from any antitrust effort.

II. There Is No Evidence That Antitrust Enforcement Is Inadequate

Any proposal to abridge the civil rights of a substantial body of citizens (in this case, the businessmen whose interests the Chamber represents) should at least be premised on some showing of necessity. There is no such showing as to the antitrust laws. Consider the tools available to the prosecuting authorities and their colleagues of the treble damage bar. Potential antitrust defendants face a battery of weapons that are exceptional in our legal system. They are subject to prosecution by two entirely independent agencies of government, with overlapping jurisdiction: the Department of Justice and the Federal Trade Commission. If they are sued by the Department of Justice, they frequently must defend parallel civil and criminal cases; if they prevail in one they still can lose the other. If they are sued by the Federal Trade Commission, their case is heard by the very body which decided to bring the complaint in the first place. The findings of that body, which thus wears two hats in the proceeding, are then given extraordinary deference by reviewing courts as expressions of administrative "expertise."

[4] After taxes.

Regardless of the outcome of the government cases, the defendant may have to run the gauntlet of multiple actions by private plaintiffs who can claim the extraordinary remedy of threefold damages (which can be computed on a speculative basis) plus lawyer's fees. If the defendant loses any one of the government actions which may be brought against him, the adverse decision creates a *prima facie* case for a private plaintiff; if he wins one or all of them, he derives no evidentiary benefit.

The notion that antitrust conspiracies are difficult to prove is a hoary fallacy which ought to have been laid to rest long ago. In the pretrial stage, witnesses in search of immunity can become so numerous as to be a real nuisance to the prosecutor—as they did in the notorious Philadelphia electrical equipment case. The defense of a conspiracy trial is a nightmare; the defendants have the choice between using joint counsel—which the jury is likely to interpret as a confession of guilt—and using separate counsel, in which case a divided defense is likely to end up totally ineffective. The picture of the lonely Government lawyer facing a battery of high-priced defense counsel fools nobody but the newspaper reporters—the bigger the defense battery, the more certain the Government victory. The rule that each member of the conspiracy is bound by the statements and admissions of all his co-conspirators is likewise of great advantage to the Government in cases where it has little or no evidence against the real target of the prosecution; the "admissions" of competitors can take the place of evidence.

The firepower of these weapons has recently been further enhanced. Just last year Congress raised the level of antitrust violations from misdemeanor to felony and authorized fines up to $1,000,000. Apart from the deterrent effect, the change in degree of criminality has also a practical influence on the prosecutor's powers. Instead of bargaining for testimony from the reluctant co-conspirator in exchange for immunity from prosecution for a misdemeanor, the prosecutor is now dealing with witnesses fearful of conviction for felony.

Moreover, the 1966 Amendments to Rule 23 of the Federal Rules of Civil Procedure, which facilitate massive class actions, have greatly enhanced the litigating power of private damage plaintiffs. Their ability to coerce settlements out of defendants who stoutly maintain their innocence is perhaps best illustrated by the famous *Antibiotics* litigation. The defendants, who have thus far been absolved of conspiracy by the FTC and ultimately acquitted in the Federal Courts, have nevertheless already paid out more than $200 million in private settlements.

We know of no evidence that violations of the antitrust laws are either serious or widespread. The Antitrust Division regularly investigates the complaints it receives; and wherever there is evidence of violation, it proceeds by criminal or civil action. The treble damage bar has been growing in numbers and in the intensity of its activity. The effects of long-continued and successful conspiracies which raise prices and generate excess profits can rarely be concealed. They become obvious to customers, potential competitors, and to others in the industry. They require the participation of too many individuals to remain a secret for long, especially now that treble damage claims have been made so rewarding.

The debatable issue in the field of antitrust enforcement is whether or not we may already have gone so far as to expand the hazards to investors beyond the limits of reason. It is well to bear in mind that the investor is not in a position to foresee or prevent all antitrust violations, and yet the doctrine of *respondeat superior* makes the investor the party ultimately liable. This is well enough if we are dealing with cases of real damages to identified entities, coupled with some likelihood that the investors in a particular company may have been unjustly enriched by an antitrust violation. But it is another matter entirely when global damages are awarded on the basis of speculation and conjecture and then trebled. The party being punished is the investor more often than the real culprit, and it seems to be stretching the theory of punishment very far indeed to claim that investors in publicly held corporations ought to be wise enough to foresee and prevent all the actions of management which may eventuallly be held violative of the antitrust laws.

TITLE II: PROPOSED AMENDMENTS TO THE ANTITRUST CIVIL PROCESS ACT

In Title II, S. 1284 would substantially broaden the powers of the Attorney General under the Antitrust Civil Process Act of 1962. This Act created the Civil Investigative Demand (C.I.D.) as an antitrust enforcement tool of the Department of Justice. A companion bill in the House, H. R. 39, includes similar provisions.

I. Summary of Bill and of Chamber's position

The specific provisions in Title II would alter existing law in at least eight respects:

Existing Statute	*Proposed Amendment*
(1) Limited to demands for documents for inspection, copying or reproduction.	Extends to include oral testimony and responses in writing to written interrogatories.
(2) Limited to investigations to ascertain past or present violations.	Extends to "any activities which may lead to any antitrust violation."
(3) Limited to demands on "any corporation, association, partnership, or other legal entity not a natural person".	Extends to natural persons.
(4) Limited to demands on persons under investigation.	Extends to "any person" who "may have, or may reasonably be able to secure any information" relevant to civil antitrust investigation.
5) Permissible use of subpoenaed documents limited to cases arising from the investigation.	Permissible use extended to any proceeding in which a Department of Justice Attorney appears.
(6) Contains provision for confidentiality of documents.	No provision for confidentiality of hearing or transcript of testimony.

The National Chamber strongly endorses competition as the basic precept for our nation's economy, and it also supports our antitrust laws as the principal means to maintain a competitive economy. In short, the Chamber agrees that the Department of Justice is entitled to effective tools for antitrust enforcement.

The main argument is support of Title II is a simplistic one, which can be summarized as follows: The FTC has investigative powers broader than the Department's C.I.D. authority and hence it would be entirely proper to give the Department the same powers as the FTC. The Chamber urges that this argument is faulty in three main respects. *First,* it is predicated on a wholly improper comparison of the full panoply of FTC investigative powers, in relation to the Department's authority alone. Such comparison ignores the fact that the Department has several powerful investigative tools, such as the Grand Jury process and complusory discovery under the Federal Rules of Civil Procedure, which the FTC does not have. When *all* of the Department's investigative tools are compared with all of the FTC's authority, there is reasonable equivalency for prosecutorial purposes, and the asserted need for expansion of the Department's investigative powers disappears.

The "FTC-has-it—so-we-want-it" argument is also unsound in a second respect. It assumes that the needs are the same on the ground that the primary roles of the two agencies in antitrust enforcement are the same. In fact the two roles are different. The Department of Justice is a *prosecutor,* whereas the Federal Trade Commission was created primarily as an *expert agency with a broad quasi-legislative role.* The Commission's function was to be fulfilled by issuance of broad antitrust guidelines, economic studies, and investigations to develop facts for legislative recommendations to Congress, as well as for keeping both business and the public apprised of broad economic trends. Sweeping investigative powers in the hands of a policy-maker may be justified. It does not follow, however, that the same powers should be given to the prosecutors.

The third reason for the Chamber's opposition rests on policy grounds. Experience shows that the granting of broad investigative powers to a prosecutor creates the possibilities of abuse, and in the absence of a strong showing of need for such powers, Congress should withhold them. Moreover, experience also shows that during periods when the FTC emphasized its prosecutorial role, the Commission's vast investigatory powers may have contributed to the Commission's undue preoccupation with trivial antitrust cases. All of this suggests that the proposed amendments would be unwise.

II. The Existing Investigative Powers of the Department of Justice are Entirely Adequate for its Prosecutorial Role

Under existing law, the Department of Justice is armed with the following investigative tools:

Pre-complaint C.I.D.'s to compel disclosure of documents of business entities under antitrust investigation.

Pre-complaint or pre-indictment grand jury subpeonas to compel disclosure of documents and oral testimony from any business entities or natural persons for all information relevant to possible antitrust violations.

Post-complaint complusory discovery procedures under the Federal Rules of Civil Procedure, which include oral depositions, written interrogatories, production of documents and requests for admissions.

FBI investigations to collect evidence of possible antitrust violations.

Use of FTC investigative powers, upon request of the Attorney General.

The above investigative tools of the Department of Justice are effective and powerful. When all of them are compared with the FTC's investigative power, the asserted discrepancy between the Department and the Commission disappears for prosecutorial purposes.

Supporters of the proposed amendments often compare the wide range of FTC investigative powers to the more limited powers of the Department of Justice under its Civil Investigative Demand (CID) procedure. This comparison is not justified, because it fails to take into account the other powerful investigative tools available to the Department. For example, the sweeping investigative powers of the grand jury may be used to investigate the mere possibility of any hardcore antitrust violation, such as price-fixing. The power of the grand jury process is virtually unlimited. No showing of "probable cause" is required. As put by the Supreme Court:

> "(The grand jury's investigative powers are) not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." [5]

Moreover, the grand jury investigation goes far beyond an inquiry into whether an antitrust offense may have been committed. As conceded by one of the top officials of the Antitrust Division, the grand jury "also gathers evidence of the offense and that evidence is available for use by the Government at trial." [6]

Moreover, if an *FTC investigation* turns up the slightest hint of a hardcore antitrust violation subject to criminal sanctions, it is the practice and policy of the Commission to refer the matter to the Department of Justice for criminal prosecution, where the full and unlimited investigative powers of the grand jury are available.

Turning next to civil antitrust cases prosecuted by the Department of Justice, the investigative tools consist of a combination of C.I.D.'s, FBI investigations, use of FTC investigative powers, and discovery procedures under the Federal Rules of Civil Procedure. Despite the Department's request for the proposed amendments, there has been no demonstration that this powerful combination of investigative tools in inadequate.

Under the Antitrust Civil Process Act of 1962, the Department has authority to issue a Civil Investigative Demand (CID) for documents of any person under investigation. The CID may be issued "prior to the institution of a civil or criminal proceedign" [7] *i.e.*, to determine whether to invoke the grand jury process in a criminal investigation or the broad discovery rules in any civil proceeding under the Federal Rules of Civil Procedure. No one seriously contends that the grand jury process is not adequate in criminal investigations, or that the Federal Rules are defective in civil litigation.

Accordingly, the only remaining issue is whether the Department of Justice is unreasonably handicapped under existing procedures in the pre-complaint stage of a civil antitrust matter. In considering this issue, it is significant that CID powers are buttressed *both* by FBI investigations *and* by the availability to the Department of FTC investigative tools. When all of these tools are combined, the Chamber respectfully suggests that there has been no showing that the CID process has failed to achieve its intended purpose, *i.e.*, providing sufficient evidence to determine whether or not to file a civil complaint in the Federal courts.

In its enforcement of the antitrust laws, the Department often uses FBI investigations. As reported by the then Chief of the Antitrust Division's Trial Section:

> "An investigation may be conducted by FBI . . . interviews and file searches, and prospective defendants may have no notice of it at all." [8]

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[5] Blair v. United States, 250 U.S. 273, 282 (1919).
[6] Mahaffie, Criminal Antitrust Investigations, 41 Antitrust Law Journal 521, 523 (1972).
[7] See section 1312(a) of the Antitrust Civil Process Act of 1962.
[6] Mahaffie, supra, at p. 521.

Moreover, the Department has available to it, when needed, the *FTC's power of investigation.* For example, under Section 6(e) of the Federal Trade Commission Act, the Commission is directed "upon the application of the Attorney General to investigate . . . the business of any corporation alleged to be violating the anti-trust acts . . ." [9] This procedure has been invoked in the past, and affords the Department every tool that could possibly be needed for its prosecutorial role.

If the Department is already entitled by invoke FTC powers by application to the Commission, the question then is—why not permit the Department to do it directly? The answer is simple—*to minimize the possibility of abuse.* When the Department invokes the FTC's investigative powers, the practice has been for the FTC to appoint an impartial Hearing Examiner to preside over the investigative hearings, while permitting the Department of Justice lawyer to conduct the interrogation. Under Title II of S. 1284, however, the prosecutor at the Department would be subject virtually to no restraints, because no impartial arbiter would be present.

It has also been argued that inasmuch as some state antitrust laws provide for pre-complaint subpoenas *ad testificandum,* the Department of Justice should have the same power. These state laws are, for the most part, in very old statutes and are notorious for their non-use. In the State of Texas where an active antitrust enforcement effort has been made, the statute does not appear to permit interrogation of witnesses; instead, the State Attorney General is limited to asking a court to require only a sworn statement from any person who knows of a violation.

To sum up, the Department's existing enforcement tools are entirely adequate. The argument that other enforcement agencies have certain types of investigative tools not available to the Department of Justice rests largely on the faulty premise that the Department has only the CID process. Instead, the CID was deliberately intended to serve only a limited and supplemental function, preparatory to invoking either the sweeping investigative power of a grand jury or the equally effective discovery rules under the Federal Rules of Civil Procedure. When all of the Department's investigative tools are taken into account, the asserted shortcomings in the Department's powers are non-existent.

III. The prosecutor does not need, and should not have, the same sweeping compulsory processes as the legislative-policy maker

A. The Primary Functions of the Department and Commission are Different

The argument that the Department needs broader investigative powers because the FTC has such powers, overlooks the significant differences in the prosecutorial functions of the Department as compared to the legislative-policy-maker function of the FTC. When the Federal Trade Commission Act was being considered by Congress in 1914, Senator Hollis—a supporter of the legislation—emphasized that one of the intended benefits would be that the "Department of Justice . . . will be able to give its main attention to the ask of prosecuting suits" for antitrust violations, leaving to the FTC the role of an expert policy-maker.

The Commission was conceived—not as a prosecutor—but as a body of experts concerned with overall antitrust policy and economic developments. In his State of the Union Message to Congress on January 20, 1914, President Wilson urged Congress to create:

> "such a Commission only as an indispensable instrument of information and publicity, as a clearinghouse for the facts for which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts . . . are inadequate." [10]

Originally, the Commission was to have no prosecuting function whatsoever. Later, Congress added the prohibition of "unfair methods of competition", so that the Commission would be able to "cast light on the grey areas of antitrust law (and) . . . permit it to bring test cases helping to eliminate these grey areas . . ." [11]

The Commission's authority to fill-in the grey areas was to be implemented only through *civil* proceedings resulting in cease and desist orders, because the purpose was *prevention* of undesirable trade practices—*not punishment.* For this reason, it is generally agreed "that the Commission should not concern itself with practices which are illegal *per se*", because the Commission's expertise in

[9] Similarly, Section 6(d) requires the Commission "upon the direction of the President . . . to investigate . . . any alleged violations of the antitrust acts by any corporation.

[10] S. REP. NO. 597, 63rd Cong., 2d Sess. 7 (June 13, 1914).

[11] Elman, Administrative Reform, 59 Geo. L. J. 777, 783 (1971).

making an "elaborate inquiry into competing policies is unnecessary" as to *per se* violations and because "enforcement should be, and usually is, undertaken by the Department rather than the Commission.[12] By concentrating its efforts on antitrust policy-making, the Commission is able to consider "significant questions arising in the grey areas of antitrust where *per se* rules are inappropriate." [13]

The legislative history of the FTC Act makes it clear that Congress conferred broad investigative powers to enable the Commission to carry out its policy-making function. The debate in Congress revolved around the question as to whether the Federal Trade Commission should be cast in the role of a rate-making agency (such as ICC), or a broad antitrust policy-maker. The first approach contemplated "even the regulation of prices", whereas the second approach recognized "that a commission is a necessary adjunct to the preservation of competition and to the practical enforcement of the law." The Senate Committee, in reporting out the bill that ultimately became the FTC Act, concluded "the Commission which is proposed by your committee . . . is founded upon the latter purpose and idea . . . . (T)he Committee has aimed to provide a body which will have sufficient power *ancillary to the Department of Justice* to add materially and practically in enforcement of the Sherman law and . . . to build up a comprehensive body of information on . . . the business world." (Emphasis Supplied) [14] Congress was especially concerned that the Commission have sufficient investigative powers to aid both the courts and the Department of Justice in the formulation of antitrust decrees *after the prosecutorial function* had ended. After noting that "large powers of investigation are given" to the Commission, Congress concluded that such powers would be needed to "bring forth both to the Attorney General and to the court the aid of special expert experience and training in matters regarding which neither the Department of Justice nor the courts can be expected to be efficient." [15]

To sum up, the FTC's broad investigative powers were intended to enable the Commission to carry-out its role as a broad antitrust policy-maker. Accordingly, it does not follow that the Department of Justice in its prosecutorial role needs the same powers.

B. Granting Sweeping Investigative Powers to Prosecutors Is Unwise.

Unfortunately, the FTC has not always adhered to its primary function as an antitrust policy-maker. The deficiencies of the FTC have been noted in numerous reports.[16] The main thrust of all of these reports was the FTC's myopic concentration on trivial litigation, rather than on its primary role of a broad antitrust policy-maker.

For example, a substantial portion of the Commission's budget in 1969 was devoted to a group which "investigates and eventually closes a myriad of trivial Robinson-Patman cases." [17] In 1968 the Director of one of the Commission's major Bureaus, discovered "while convalescing at home from an illness . . . (that) 56 cases (should) . . . be closed (for) . . . staleness or lack of importance," and two "were closed at least in part because the files had been lost." [18] It was estimated that *as much as 70% of the Commission's investigatory time was wasted in* fruitless pursuit of non-existent antitrust violations.[19]

Several factors contributed to the Commission's misplaced efforts. It is fair to suggest, however, that one of the contributing factors was the ease with which the vast investigative powers of the Commission could be invoked in its prosecutorial role.

The proposals in Title II of S. 1284 pose the same risk for the Department of Justice. If Congress grants the Department vastly increased investigative powers, it is a fair assumption that such powers will be used. The experience of the FTC suggests that there is a real danger that many on the staff of the Antitrust Division could become bogged down in investigations of antitrust trivia.

The role of the antitrust policy-maker should be to evaluate alternatives and to seek the wisest course possible, whatever might be the outer limits of antitrust law. Judge Friendly, in his provocative study of administrative agencies, criti-

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[12] Elman, supra, at p. 783.
[13] Ibid.
[14] S. REP. NO. 597, supra, at p. 10.
[15] Ibid., at p. 12.
[16] See, e.g., Report of the ABA Commission to Study the Federal Trade Commission (September 15, 1969); the so-called "Nader Report" in 1969, as well as the Neale Report in 1968 and the Stigler Report of 1969.
[17] Elman, supra at p. 795.
[18] Elman, supra at p. 801.
[19] Ibid., at p. 798.

cized the "administrative tendency to consider that the power may wisely be exercised whenever . . . courts would think it might lawfully be (exercised)".[20] The sweeping investigative powers of the FTC were created for its policy-making role. They should not be conferred upon the Department of Justice for its prosecutorial role.

Moreover, it would be equally unwise to transfer the FTC's function as an antitrust policy-maker to the Department of Justice. Congress needs no reminder that the executive departments, including the Department of Justice, are subject to Presidential authority. The Federal Trade Commission, however, is an independent regulatory agency. After evaluating a studious proposal to transfer the policy-making function to executive departments, Judge Friendly concluded:

> "Quite simply, I find it hard to think of anything worse. Determination of 'basic needs of public policy' within the general command of the statute is what Congress created the Commission to do. Either the Commission can perform the task or it cannot. If it cannot, it should be abolished . . . . What would be intolerable would be . . . the prospect of making 'day to day' decisions in line with the 'policy guides' of White House assistants, whether or not the latter were characterized by a 'passion for anonymity'. (There would be) . . . the extravagance of having two groups share a common responsibility (and) we would be worse off rather than better." [21]

It is ironic that in the wake of the Watergate scandals, Congress would seriously consider conferring vast new powers on the Attorney General. While the present Attorney General is a man of great integrity and self-restraint, as well as an antitrust expert, it is worth repeating the truism that ours is a government of laws and not of men. Traditionally, our law has imposed careful limitations on prosecutors, because experience has proved—time and time again—that broad powers breed abuse. There is no reason to single out the antitrust field for different treatment.

When Congress enacted the Antitrust Civil Process Act of 1962, Congressional debates showed much apprehension and awareness that overly broad investigatory power could be seriously misused. As one court has pointed out, during the Congressional debates there was:

> " . . . tremendous concern showed by the committees, and other concerned with the bill, that it be surrounded by adequate safeguards and proper limitations on its scope. A real fear was expressed as to the danger of improper use of investigative power. These fears were manifested in the many protective provisions put into the Act at various stages." [22]

The safeguards in the 1962 Act are the very ones which Title II of S. 1284 would eliminate: limitation to documentary demands and exclusion of prosecutorial oral interrogations; limitation to business entities and exclusion of natural persons; and limitation to those under investigation and exclusion of third party persons not involved.

Under existing procedures, prosecutors have broad authority to obtain subpoenas both from the grand jury processes in criminal investigations and under Federal Rules for discovery in civil cases, but all are under the ultimate supervision of the courts. S. 1284, however, would transfer that authority to the Attorney General. The Chamber respectfully suggests that such transfer would be a mistake.

IV. Conclusion

The broad investigative tools currently available to the Department of Justice are entirely adequate for effective antitrust enforcement. While the Department's CID authority may be more limited than the Commission's full range of investigatory tools, the Department has available the grand jury process, compulsory discovery under the Federal Rules, FBI investigations, even access to the FTC's powers. There is no need for conferring more power.

Moreover, it would be unwise to confer upon a prosecuting agency the broad investigative powers of a policy-maker agency. The Federal Trade Commission, unlike the Department of Justice, is an independent agency, and has recently made significant strides in exposing its internal procedures to public scrutiny. The Attorney General, on the other hand, is a Cabinet officer subject to Presidential control, where the possibility of abuse of broad power is always present.

During periods that the FTC has emphasized its prosecutorial role, the result was undue preoccupation with trivial antitrust cases, and almost complete failure

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[20] Friendly, The Federal Administrative Agencies, P. 118 (1962).
[21] Friendly, supra, at p. 153.
[22] United States v. Union Oil Co., 345 F. 2d 35, (9th Cir. 1965).

to carry out the primary function of policy-making. Under S. 1284, the same risks would face the Department of Justice.

For all these reasons, the Chamber respectfully urges that the "Antitrust Civil Process Act Amendments" as found in Title II of S. 1284, should be rejected.

TITLE III: NEW PROVISIONS FOR ENFORCEMENT OF FTC SPECIAL ORDERS AND SUBPOENAS

In Title III, S. 1284 would amend Section 10 of the Federal Trade Commission Act to impose substantial changes in existing law relating to enforcement of the Commission's special orders and subpoenas. The specific provisions in Title III would alter existing law in two important respects: (1) forfeitures for failure to comply with an FTC order or subpoena, now $100 a day, would be increased to a *minimum* of $1,000 per day and to a maximum of $5,000 per day; and (2) the criteria for staying accumulation of penalties and for enjoining enforcement of unlawful subpoenas would be changed so drastically that such equitable relief would become virtually impossible.

The National Chamber does not oppose an appropriate increase in the daily forfeiture penalty. It does oppose any concept of a *mandatory minimum penalty* to be imposed irrespective of whether the company has proceeded in the utmost good faith.

The more fundamental objections, however, go to the harsh and unduly punitive provisions in Title III which eliminate any realistic chance to stay penalties pending a good faith challenge of the Commission's order and which appear flatly to prohibit enjoining the enforcement of an unlawful subpoena. The National Chamber protests, because it is unconscionable for Congress to legislate that a court is forbidden to stay accumulation of penalties until the Commission serves a notice of default and that fifteen days thereafter a court must impose mandatory minimum penalties of $1,000 per day, irrespective of the company's good faith. Even if a company could somehow prepare the necessary legal papers and obtain a judicial hearing within fifteen days,[23] the bill would change existing criteria for staying forfeitures so as virtually to preclude courts from granting this form of equitable relief. Moreover, the proposed criteria for enjoining enforcement of an FTC subpoena would be even much more harsh. The courts, under S. 1284, would apparently be powerless to enjoin an *unlawful* subpoena, irrespective of however flagrant the Commission's unlawful conduct might be. Even if such harsh provisions could somehow surmount constitutional due process requirements (which is, at best, doubtful) they could be justified only upon the most clear and convincing showing that existing procedures have been totally inadequate. No such showing can be made.

I. Existing Authority To Enforce FTC Subpoenas Is Fully Adequate

Under existing law, the Commission's compulsory orders and subpoenas may be enforced in three different ways:

A civil enforcement suit under Section 9 of the FTC Act, which may be initiated by the Commission immediately after any default and which provides the Commission with *prompt and complete relief* with no delay whatsoever.

A suit for forfeitures or penalties of $100 per day, starting thirty days after the Commission has served notice of default.

A criminal proceeding for willful refusal to comply, punishable by a fine of $1,000 to $5,000, or by imprisonment of up to one year, or by such fine and imprisonment.

The Commission may invoke any, or all, of these enforcement procedures. For example, in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), the Commission asked for, and obtained, *both* a court order of enforcement, plus civil forfeitures. In the pending enforcement action involving the Line of Business program, however, the Commission's complaint has asked only for a court order of enforcement and does not seek forfeitures.[24]

The empirical evidence shows that the existing enforcement procedures are entirely adequate, and in many respects—severe. For example, in the *St. Regis Paper* case, the Commission subpoenaed the company's Census Report which the company had prepared and submitted to the Government under statutory and

[23] With the heavy calendars of most district courts, this would normally be almost impossible.

[24] See FTC v. American Standard, Inc., Civ. No. M18-304 (S.D. N.Y.). This is the Line of Business litigation currently pending before the United States District Court for the Southern District of New York, where the Commission is asserting that under existing law, the entire program should be summarily enforced by the court.

Presidential assurances of confidentiality. There was absolutely no doubt that the company's challenge to the FTC's subpoena was made in good faith. In a parallel case against another company, the Court of Appeals for the Seventh Circuit had already rendered an opinion upholding the company's position.[25] In the Supreme Court, however, the majority ruled that St. Regis was subject to forfeitures because the company "did not try to obtain judicial review prior to the commencement of this (enforcement) action by the Government, nor did petitioner seek a stay once the litigation had begun." 368 U.S. at 225.

In keeping with the Supreme Court's severe approach in *St. Regis*, the lower courts have been generous in their enforcement of FTC subpoenas. The Commission has encountered no obstacles. On the contrary, the courts have been warm and hospitable in upholding Commission orders. *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950); *Genuine Parts Co.* v. *FTC*, 445 F. 2d 1382 (5th Cir. 1971).

Moreover, under existing law, the Commission proceeds with enforcement of its typical subpoena under "summary procedures" which are commenced by a simple "order to show cause" and which are disposed of quickly in a manner comparable to a summary judgment motion. *See, e.g., FTC* v. *Standard American, Inc.*, 195 F. Supp. 801, 802 (E.D. Pa 1961), *aff'd*, 306 F. 2d 231 (3rd Cir. 1962); *FTC* v. *Sherry*, Trade Reg. Rep. § 72,906 (D. D.C. 1969); *FMC* v. *Transoceanic Terminal Corp.* 252 F. Supp. 743 (N.D. Ill. 1966). In the pending Line of Business litigation, the Commission is contending that the District Court must prohibit the companies from invoking normal discovery procedures on the ground that inasmuch as enforcement actions "are purely summary proceedings . . . a respondent is not entitled to the discovery that is available to a party in the (ordinary) . . . proceeding." [26]

In sum, the existing law for enforcement of FTC subpoenas is entirely adequate and perhaps unduly severe. There has been no showing of any need for further punitive measures to enforce such subpoenas or special orders.

II. The Proposed Changes for Staying the Accumulation of Penalties and Enjoining Enforcement of FTC Subpoenas are Unjust and Probably Violate Constitutional Guarantees of Due Process

At the time S. 1284 was introduced, Senator Hart suggested:

> "Title III also *codifies case law* respecting enforceability and enjoining of Commission compulsory processes and the accumulation of civil penalties for failure to comply with such process." (Emphasis supplied.) See statement of Senator Hart, Cong. Rec. S. 4868 (March 22, 1975).

With all due deferrence, S. 1284 does not codify case law. It would drastically change existing law.

Turning first to existing law on staying the accumulation of forfeitures, the Supreme Court has established that the test is whether the challenge to the Commission's subpoena is being made in *good faith*. This rule was established by the Supreme Court in *St. Regis Paper Co.* v. *United States*, 368 U. S. 208 (1961). There, the company argued that the imposition of forfeitures during the period of judicial review would "deprive it of property without due process of law." The Supreme Court noted that the "premise" of such argument was that due process would be lacking if "the orders of the Commission were not judicially reviewable, except at the risk of paying daily forfeitures accumulated throughout the period of noncompliance, including the period of judicial review." *St. Regis Paper Co.* v. *United States*, 368 U.S. at 225.

The Court then rejected the company's position—not because of any inherent defect in the constitutional argument—but because the company had failed to invoke available procedures to "obtain judicial review prior to the commencement of this (forfeiture) action by the Government" and because the company did not "seek a stay once the litigation had begun." *Ibid.* The Supreme Court then endorsed the suggestion in its prior *Morton Salt*[27] opinion that the courts would not

[25] FTC v. Dilger, 276 F. 2d 739 (7th Cir. 1960). Although the Supreme Court, by a divided vote, ultimately ruled in favor of the FTC's position, Mr. Justice Black, a strong supporter of antitrust and the Commission, wrote a vigorous dissent, in which three Justices altogether concurred.

[26] See Commission's "Memorandum in Support of Application for Enforcement Orders Issued by Federal Trade Commission", p. 5 (filed February 11, 1975) in FTC v. American Standard, Inc., Civ. No. M18-304 (S.D.N.Y.).

[27] See United States v. Morton Salt Co., 338 U.S. 632, 654 (1950). There the Court suggested that a pre-forfeiture test of validity might be obtainable under the "Declaratory Judgment Act, the Administrative Procedure Act or general equitable powers of the court . . ."

be powerless to stay penalties for violation of FTC subpoenas "pending a *good faith test* of their validity." (Emphasis supplied.) Although St. Regis had made no effort to present a pre-forfeiture good faith test, the Supreme Court declared:

> "We note, however, that the Declaratory Judgment Act, 28 U.S.C. Sec. 2201, provides that 'In a case of actual controversy within its jurisdiction . . . any court . . . may declare the right . . . of any interested party seeking such declaration . . .' This appears sufficient to meet petitioner's needs." 368 U.S. at 227.

Accordingly, since the Declaratory Judgment Act permitted St. Regis to make a pre-forfeiture good faith challenge of the Commission's subpoena, there was no denial of due process.

Under S. 1284, however, the "good faith" test would be scuttled. Instead, a stay of forfeitures would be possible only by meeting a rigid three-part test, requiring the party [28] to demonstrate in advance: (1) "substantial probability of ultimate success on the merits"; (2) a showing that the party "will be irreparably injured" unless penalties are stayed; and (3) "equities clearly favor such stay."

Far from codifying the existing "good faith" rule for staying forfeitures, S. 1284 would impose standards even more rigid than those required for obtaining a preliminary injunction against the Commission.[29] Indeed, the above criteria under S. 1284 would be almost impossible to meet. From any practical point of view, S. 1284 would punish any party—at a minimum rate of $1,000 per day—merely for bringing a good faith challenge. There is no justification for such punitive action.

The rigid criteria in S. 1284 for staying forfeitures are so punitive that they probably violate constitutional due process. As previously noted, the Supreme Court in *St. Regis* recognized the need for staying forfeitures "pending a good faith test" of the validity of the FTC's orders or subpoenas. The lower courts have followed the same course. As put by Chief Judge Wright of the United States District Court for the District of Delaware, "any other interpretation of the statute and regulations would raise serious questions of due process." *Continental Baking Co.* v. *Dixon*, 283 F. Supp. 285 (D. Del. 1968).

Turning next to challenges of the *merits* of an FTC subpoena, S. 1284 once again would impose criteria far more rigid and harsh than existing law. Under S. 1284, the courts would be precluded from enjoining enforcement of any subpoena or special report except after the party has demonstrated that compliance "is unduly burdensome" or "is not reasonably relevant to the Commission's (inquiry)." S. 1284 then goes on expressly to provide that the "Commission shall have authority to determine its own jurisdiction to conduct investigations . . . unless such investigation . . . is expressly prohibited by this Act." Thus, to enjoin an FTC subpoena under S. 1284, the only grounds would be burden, because the Commission could always "determine its own jurisdiction" in a manner that would satisfy relevancy. Accordingly, S. 1284 is apparently intended to foreclose any opportunity whatsoever to stop the Commission from enforcing an *unlawful* subpoena.

Existing law would be drastically changed. For example, the Commission's Line of Business program has been preliminarily enjoined by a federal court—*not* because of any burden or irrelevancy—but because the Commission's promulgation of the program was prima facie unlawful under the Administrative Procedure Act. *A. O. Smith Corp.* v. *FTC*, Civ. No. 75-15 (D. Del. February 1975). Under S. 1284, the Commission could compel companies to submit reports even though the Commission has flagrantly violated the Administrative Procedure Act and the reports are therefore totally unlawful. In this same connection, the Federal Reports Act expressly requires the Commission to clear certain special reports, such as the Line of Business Report, with the Comptroller General. If the Commission were to ignore the Federal Reports Act, S. 1284 would grant complete immunity from any injunction against such unlawful conduct.

Even if the Commission needed additional enforcement powers, the draconian procedures in S. 1284 are wholly unjustified.

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[28] Under Title II of the recently enacted Magnuson-Moss Act, the Commission's authority to issue compulsory process, such as subpoena and special reports, now extends to natural persons, as well as corporations.

[29] The existing criteria for a preliminary injunction are a "showing of *either* (1) probable success on the merits and *possible* irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardship tipping decidedly toward the party requesting the preliminary relief." Sonesta Int'l Hotels v. Wellington Associates, 483 F. 2d 247, 250 (2nd Cir. 1972). Even if the criteria in S. 1284 were limited to existing law, this provision is predicated on the erroneous assumption that the criteria for a stay of forfeiture are the same as those for a preliminary injunction. The two types of equitable relief are entirely different. See Continental Baking Co. v. Dixon, 283 F. Supp. 285 (D. Del. 1968).

III. The Proposed Mandatory Minimum Penalty Would Be Unfair

Under S. 1284, any person who determines in good faith to challenge the validity of an FTC subpoena faces a mandatory minimum penalty of $1,000 per day. When combined with other provisions of S. 1284 which virtually prohibit any court order staying forfeitures, S. 1284 would obviously have a chilling effect on any one contemplating a good faith challenge.

For the ordinary citizen,[30] the combination of possible forfeitures of $1,000 a day, plus no stay order, would preclude challenge. While the individual citizen may be wholly innocent of any antitrust violation, and may not even be the target of the FTC's investigation, S. 1284 would force such an individual to succumb even though the Commission's subpoena might be unlawful.

For small companies,[31] the prospect of forfeitures at the rate of $1,000 per day could likewise be staggering. Nothing in the Commission's past history suggests that small business is exempt from FTC enforcement procedures. For example, in the Commission's current proceeding in the franchised soft drink bottling industry, numerous small business entities are deeply involved and view the Commission's proceeding as threatening their existence.

The enormous minimum forfeiture could very well convert this feature of S. 1284 into a *criminal fine*.[32] The courts refuse to be bound by legislative labels, particularly where the so-called "civil" forfeiture is far in excess of the maximum fine under a parallel criminal statute.[33] Section 10 of the FTC Act makes failure to comply with an FTC subpoena subject to *criminal* sanctions, but the maximum criminal fine is only $5,000 irrespective of the length of the period of non-compliance. Thus, failure to comply with an FTC subpoena could result in a maximum criminal fine of only $5,000, whereas a good faith challenge requiring only six months of court litigation [34] would result in a *minimum*, "civil" forfeiture of $180,000 up to a maximum of $900,000.

The U.S. Chamber strongly protests the provisions in S. 1284 calling for a mandatory minimum penalty of $1,000 per day, regardless of the good faith basis for challenging an FTC subpoena or special order.

IV. The Assumption That the Commission is Always Right and the Companies are Always Wrong

The punitive procedures in Title III could be justified, if at all, only on the assumption that the Commission's subpoenas are always right and that the companies' challenges are always wrong. An objective review of the cases refutes any such assumption.

The prime example is the *St. Regis Paper* case. There, the Commission subpoenaed a Census Report which the company had prepared pursuant to a statute with a strong confidentiality provision, as well as a Presidential proclamation admonishing all reporting companies that the "Census has nothing to do . . . with the enforcement of any national, state or local law or ordinance (and that there) need be no fear that any disclosure will be made regarding any individual person or his affairs." [35] Several lower courts agreed with the company's position. Three Justices of the Supreme Court likewise agreed, including Mr. Justice Black who sharply criticized the majority for deciding that "the solemn and comprehensive promises" which one arm of the Federal Government had made "need not be honored" by another part of the Federal Government, the Federal Trade Commission.

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[30] As previously noted, the recent Magnuson-Moss Act extended the FTC's authority to issue compulsory process to natural persons, as well as single proprietorships and partnerships.

[31] Numerous small companies are members of the National Chamber.

[32] Compare United States v. Futura, Inc., 339 F. Supp. 162 (N.D. Fla. 1972). There, the court was concerned with the Economic Stabilization Act of 1970 which authorized two types of suits for violations of regulations, one of which was called a "fine". The court ruled that the fine was a criminal penalty, subject to criminal procedures.

[33] See United States v. Shapleigh, 54 Fed. 126 (8th Cir. 1893). There the defendant was charged with filing a fraudulent claim against the Federal Government, and the statute permitted either a criminal or civil suit. Under the so-called "civil" suit, the defendant could have been assessed an amount far in excess of the penalty in a criminal case. The court held that the civil action was legally a criminal prosecution. See also Boyd v. United States, 116 U.S. 616 (1886), where the Supreme Court endorsed essentially the same type of analysis.

[34] Six months for judicial review would be a reasonable minimum period in light of the heavy calendar for most federal district courts, and if the Government, for example, were to lose in the trial court and then appeal, as it did in the St. Regis case, the forfeitures under S. 1284 could reach astronomical heights, i.e., up to $3,650,000 for a good faith challenge where the case is before the courts for two years.

[35] St. Regis Paper Co. v. United States, 368 U.S. 208, 216.

In another case (which the Commission repeatedly cites with approval in the Line of Business litigation because the court used a "summary procedure"), the court upheld portions of a Commission subpoena but specifically rejected numerous other specifications in the same subpoena. As to the rejected specifications, the court was especially critical:

> "Most of the (objectionable) items, however, are phrased in general terms and several are of the typical dragnet variety calling for 'all correspondence, memoranda or other written material' relating to various subjects." [36]

The court was also critical of the extensive time period, inasmuch as some items required production of all documents "for the period 1945 to date". Accordingly, the court refused to enforce numerous specifications of the subpoena.

The main thrust of Title III is plainly designed to drastically curtail, if not eliminate, the right to challenge an FTC subpoena. If such procedures were proposed in any context other than antitrust, civil libertarians would be up in arms—objecting to over-reaching incursions of governmental procedures and to the obvious opportunities for abuse of power.

TITLE IV: PARENS PATRIAE

The "parens patriae" provisions in Title IV of S. 1284 would amend Section 4 of the Clayton Act so as to allow the Attorney General of each state to bring antitrust actions, for both treble damages and injunctive relief, on behalf of all persons residing in the state and of all political subdivisions of such states.

Title IV is similar to the bill introduced in the House by Representative Rodino, as H.R. 12921 in the 93rd Congress and reintroduced in the 94th Congress as H.R. 38. In the House, hearings were held on H.R. 12921 in March 1974 and again on H.R. 38 in February 1975, before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee. The differences between Title IV of the pending Senate bill and the earlier House bills appear to be responsive to criticisms voiced at the House hearings.

I. *Summary of Title IV and of Chamber Position*

In Title IV, the proposed bill would amend the Clayton Act by adding several new subsections to Section 4 which provides for antitrust treble damage suits by private persons and single damage suits by the Federal government. The essence of Title IV is found in provisions authorizing three new types of treble damage lawsuits by a state, amending class action procedures to permit publication notice rather than actual notice, and adding an unprecedented rule on proof of damages. More specifically, the bill provides for

1. Three types of treble damage lawsuits by a state:

   as parens patriae for damages sustained by all persons residing in the particular state, or an alternative class action with respect to such damages where the "interest of justice so requires";

   as parens patriae for all damages to the "general economy of that state or any political subdivision thereof"; and

   on behalf of any or all political subdivisions with respect to damages sustained by such subdivision.

2. Eliminating existing procedures in class actions designed to give actual notice to absent parties, and substituting in those lawsuits created by the bill imputed notice through publication of legal notice as prescribed by local state statute or rules for ordinary lawsuits.

3. Permitting recovery of "aggregate damages" based on "statistical or sampling" or "other reasonable system of estimating aggregate damages", without proof of any individual claims, which would permit use of the much criticized "fluid recovery" or class action based on the "pot-of-gold" concept.[37]

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[36] See United States v. Associated Merchandising Corp., 265 F. Supp. 318 (S.D.N.Y. 1966).

[37] In addition, the bill also includes other procedural provisions. One requires the Attorney General of the United States to notify any state attorney general of the latter's right to bring an action of the type outlined above, and further authorizes the Attorney General of the United States to bring such action himself should the state attorney general decline to do so. The bill would also authorize any state, with respect to a federally funded state program, to recover treble damages for the entire amount of overcharges or other damages, with the Attorney General of the United States having the right to sue for treble damages on behalf of any state that declines to bring such action after notice from the Attorney General of the United States.

The parens patriae provisions of Title IV in S. 1284, as well as the counterpart bills pending in the House, are aimed at two separate and distinct questions: *a class action question*, arising out of cases involving numerous consumers with small individual claims; and the *"general economy" question*, such as was presented in the claim by the State of Hawaii that certain antitrust violations had caused damages to the State's "general economy" in *Hawaii* v. *Standard Oil Co.*[38] In the bills, both questions are addressed under the umbrella of the ancient legal concept of "parens patriae." Proponents urge that the proposed parens patriae solutions to the perceived problems are required to achieve three basic objectives of the antitrust laws: compensation of individual consumers injured by unlawful overcharges; prevention of unjust enrichment by business concerns imposing unlawful overcharges; and deterrence of unlawful conduct by business concerns.

Stated simply, the National Chamber endorses the above objectives of the antitrust laws and agrees that business conduct unlawful under antitrust should be subject to effective sanctions. It is respectfully suggested, however, that the parens patriae bills, as now drafted, are far wide of their intended mark, in the following respects:

1. The perceived class action problem is largely theoretical, because existing procedures have provided a good measure of effective relief, including relief to a large number of consumers with very small claims.
2. The provision of the bill allowing estimated aggregate damages is unwise and improper because it would adopt the "fluid recovery" theory or the "pot-of-gold" concept which has already been rejected by the courts.
3. The "publication" notice provisions of the bill would violate fundamental constitutional concepts of due process.
4. The "general economy" issue is obfuscated by use of the parens patriae concept and should be addressed in practical terms of whether antitrust offenses have in fact inflicted identifiable monetary losses to the treasuries of the various states sufficient to justify subjecting the business community to the threat of multiple parallel lawsuits in the fifty states.
5. The bill would create a number of complicated questions for litigation involving the relationship between the proposed parens patriae lawsuits and other lawsuits under existing treble damage provisions of Section 4 of the Clayton Act.
6. The asserted class action problem is *not* an antitrust matter, and assuming *arguendo* that existing class action procedures need revision, the matter should be addressed in the broader context of Rule 23 of the Federal Rules of Civil Procedure which govern all types of class actions, antitrust and others.

Each of the above points will be canvassed in more detail.

II. Existing Class Action Procedures Have Provided Effective Relief, Including Relief To Large Number of Consumers With Small Claims

In hearings before the House on H.R. 38 and its predecessor, proponents of parens patriae bills uniformly agree that the "problem" revolves around cases in which members of the class are great in number but their individual claims are small in dollars. This perceived problem had its genesis in the case of *California* v. *Frito-Lay.*[39] In that litigation, the State of California alleged that consumers of potato chips and other snack items had been overcharged pursuant to an illegal antitrust price-fixing conspiracy, and the suit was brought *both* as a class action and as parens patriae. The courts *upheld the class action* but rejected California's claim for *additional damages* which was made under a vague and wholly improper concept of parens patriae. Moreover, the defendants in that case have now agreed to pay over $6 million in damages—as part of a settlement of the class action lawsuit. Appended to this statement is a copy of the form approved by the Court for compensating the overcharged consumers of potato chip and other snacks, including consumers who spent less than a dollar per month. Thus, the class action "problem"—based on the asserted lack of effective relief for numerous consumers with small claims—has not been substantiated. The settlement in the *Frito-Lay* case dispels any need for legislation to correct a non-existent class action problem.[40]

[38] 405 U.S. 251 (1972).

[39] 474 F. 2d 774 (9th Cir. 1973), *cert. denied*, 412 U.S. 908 (1973).

[40] The Attorney General of California, after conceding that existing class actions may provide at least a "partial solution", recognized that the parens patriae recovery sought by California in the *Frito-Lay* case went *beyond payment of compensation to injured consumers*. In his statement submitted to the House on H.R. 12921, the Attorney General of California noted that the recovery "as California envisaged in Frito-Lay" would "begin when class action recovery ends." Hearings on H.R. 12528 and H.R. 12921 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 93rd Cong. 2d Sess., ser. 43, 85 (1974). Thus, even California recognized that Frito-Lay reveals no inherent defects in existing class action procedures in terms of actual payments to injured consumers.

This same point was underscored only a few weeks ago in another class action proceeding in California.[41] The Lower Court in Los Angeles has upheld a class action on behalf of all consumers who used their credit cards to purchase deceptively advertised gasoline. The Court rejected the argument that the large number of consumers with only small dollar claims would defeat the class action procedure.

The perceived "problem" is often self-inflicted by over-zealous attorneys seeking to represent the class. For example, in the much discussed *Eisen*[42] litigation, the plaintiff's own attorney, perhaps as a litigating tactic, deliberately undertook to create a class of millions of odd-lot purchasers of securities. Mr. Justice Douglas, in his concurring opinion, pointed out various alternative avenues which the plaintiff's attorney could pursue under existing Rule 23 procedures, and suggested, for example, that the use of "subclasses" might reduce the case to manageable proportions.

The real problem is one of judicial manageability—which cannot be solved by legislative fiat. For example, in the *Hotel Telephone Charges* litigation, the court was especially critical of the plaintiff's attorney for "structuring this suit to include over 600 defendants and millions of plaintiffs", because this "virtually ensured that the litigation would be intolerably time-consuming" and "likely to consume decades of judicial time", whereas the "average individual recovery . . . is estimated to be only $2.00 per person".[43] There is no rational basis on which Congress should *compel* the federal courts to entertain unmanageable lawsuits in order to compensate consumers who allegedly may have incurred overcharges of a dollar or so.[44] Moreover, a new statute—purporting to authorize unmanageable lawsuits that the courts have heretofore rejected—could not magically transform those lawsuits into manageable cases.

Existing procedures have provided a reasonable measure of effective relief in terms of compensating consumers, as exemplified by the settlements in both the *Antibiotic* cases and the *Frito-Lay* case.[45] If Congress nevertheless concludes that the problem is sufficiently grave to warrant a new statutory mechansim, it should consider a far simpler solution. For example, legislation could authorize a state attorney general to sue as a class representative under existing class action safeguards, *irrespective* of whether the state itself has purchased the item involved or was directly injured in its proprietary capacity. Such simple legislation would eliminate all procedural obstacles to any state attorney general who is genuinely interested in pursuing a class action on behalf of consumers in his state.[46]

III. Recovery of "Aggregate Damages" Without Proof of Individual Claims is Unwise and Improper

Under the bill, aggregate damages could be recovered "without . . . proving the individual claims of each . . . person or political subdivision." Moreover, such aggregate damages could be established by any "reasonable system of estimating aggregate damages as the court in its discretion may permit."

Essentially, this feature in the bill would adopt the much criticized "fluid recovery" or "pot of gold" concept for class actions.

This concept has never been used in a litigated case. The one and only occasion in which the "pot of gold" concept was employed occurred in the Antibiotic Drug cases where the defendants created an overall settlement fund which was labeled as the "pot of gold" and which was thereafter distributed under the supervision of the court.[47] Thereafter, when another trial judge undertook to use the same "pot of

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[41] Sandra Lee Cartt v. Standard Oil Company of California, 704 BNA ATRR A-31 (Los Angeles Cty. Super Ct. 1975).

[42] Eisen v. Carlisle & Jacqueline, 417 U.S. 156 (1974).

[43] In re Hotel Telephone Charges, 500 F. 2d 86, 90 (9th Cir. 1974).

[44] Where *punishment* or elimination of unjust *enrichment* is appropriate in such cases, the new penalties established by Congress last year are entirely adequate, calling for fines up to $1 million for each offense, making an antitrust offense a criminal felony, and providing for up to three years in jail.

[45] Insofar as the parens patriae bills provide for lawsuits based on injuries to the State's "general economy", they plainly go beyond any compensation to injured consumers. This point is discussed later in this statement.

[46] In hearings on the pending House bills, several state attorneys general commented that the legal staff of the state would be in a far better position to represent the public interest of consumers, as compared to the private antitrust bar which frequently has been critized for bringing mammoth class actions where the real interest is in huge attorneys' fees rather than the compensation for consumers. In this connection, the Subcommittee should clarify the bill to ensure that the state attorney general or his staff in fact conducts whatever class action litigation might be authorized by any new legislation. Otherwise, some states might be tempted merely to "farm out" the litigation on a contingent fee basis—without any direct participation by state authorities—on the theory that whatever residual monies are recovered will be a "plus" for the state's treasury.

[47] In re Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971).

gold" concept in the *Eisen* litigation, the Court of Appeals for the Second Circuit flatly rejected any contention that the *Antibiotics* settlement provided a legal basis for *imposing* the pot of gold concept upon the defendants in a litigated case. Judge Medina emphasized that the settlement in the *Antibiotic* cases "was a consensual affair made possible by the agreement of the parties, whereas "(h) ere we have no fund. There is no settlement. Every issue is contested and litigated." Judge Medina then went on to rule:

> "Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law . . . We hold the 'fluid recovery' concept in practice to be illegal, inadmissible as a solution of the manageability problems of class actions, and wholly improper." [48]

The "pot of gold" concept has been rejected in other courts for much the same reason. In one case, the plaintiffs strenuously argued that the insuperable manageability problems could be "solved by allowing damages in the form of fluid recovery", but that argument was rejected because "allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights under the antitrust statutes." [49]

S. 1284 would also apparently authorize the use of "averaging" concepts in proof of aggregate damages. Under the proposed Section 4C(c), aggregate damages could be established on the basis of a "pro rata allocation" of alleged overcharges to sales occurring within the state, which presumably is intended to permit broad averaging on the theory that each dollar of sales within any particular state carries the same overcharge, irrespective of what the actual facts might be.

Such averaging has been uniformly rejected by the courts. For example, in a recent case involving "numerous highly individual factual and legal issues relating to the fact of and amount of damages", the plaintiffs argued that all such problems "could be easily handled in a class suit by a collective or fluid type of recovery based on average profits or average awards to the class members"; but the court promptly rejected such contention "because average awards erode due process." *Al Barnett & Son, Inc.* v. *Outboard Marine Corp.*, 64 F.R.D. 35, CCH Trade Reg. Rep. Par. 75, 243 (D. Del. 1974). Similarly, in litigation based on alleged price fixing of Volkswagen automobiles, the court rejected expert testimony based on average discounts off the manufacturer's suggested retail price, because "his damage assessment deals with averages; there is no evidence in the record which would indicate how many transactions are or would have been an average transaction." [50]

The "pot of gold" concept, as embodied in S. 1284, would encounter still other constitutional obstacles. The Supreme Court has ruled on numerous occasions that our Constitution guarantees each defendant the right to be apprised of the particular claims asserted against him and to cross-examine adverse parties. This fundamental right cannot be denied merely because the attorneys drafting the complaint have defined the class to include numerous members or because it would be burdensome on the courts to grant the defendant his constitutional rights.[51] Similarly, the Constitution guarantees each defendant a jury trial on all issues of fact, including issues on damages, *Swofford* v. *B. & W., Inc.*, 336 F. 2d 406 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); *Smyth Sales* v. *Petroleum Heat & Power Co.*, 141 F. 2d 41 (3rd Cir. 1944).

Under S. 1284, however, no jury would ever have an opportunity to evaluate the individual damage claims. Instead, those claims would be considered *after* the aggregate fund had been created, and would be paid on the basis of presently non-existing state law or ad hoc procedures created by each district court "in its discretion".

In sum, the provisions in S. 1284 endorsing fluid class recovery based on the "pot of gold" concept is unwise and improper, and raises serious questions as to its constitutionality.

IV. The Notice of Provisions of S. 1284 Would Violate Fundamental Constitutional Concepts of Due Process

The proposed bill would drastically alter existing constitutional safeguards on notice. It would do so by expressly authorizing "publication" notice rather than mail or actual notice to the members of the class on whose behalf the suit is brought.

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[48] Eisen v. Carlisle & Jacquelin, 479 F. 2d 105, 1018 (2nd Cir. 1973) *rehearing en banc denied*, 479 F. 2d 1020, *aff'd on other grounds*, 417 U.S. 156 (1974).
[49] In re Hotel Telephone Charges, 500 F. 2d 86, 90 (9th Cir. 1974).
[50] Ralston v. Volkswagenwerk, 61 F.R.D. 427, 432 (W.D. Mo. 1973).
[51] See, e.g., Morgan v. United States, 302 U.S. 1, 18 (1938); Goldberg v. Kelly, 397 U.S. 254 (1970).

In its recent *Eisen IV* opinion, the Supreme Court considered this issue. The Court quoted, with approval, the Advisory Committee's Note to Rule 23, relating to the prescribed notice under Rule 23(c)(2). The Committee specifically observed that the notice mandated by Rule 23 is "not merely discretionary" because such "mandatory notice . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject." The Committee concluded that the Supreme Court's earlier decision in the *Mullane case* [52] required the mandatory notice provisions in Rule 23.[53]

In its 1974 *Eisen* opinion, the Supreme Court reiterated its endorsement of Mullane:

> "In *Mullane* the Court addressed the Constitutional sufficiency of publication notice rather than mailed individual notice . . . The Court observed that notice and an opportunity to be heard were fundamental requisites of the Constitutional guarantee of procedural due process." [54]

The Court in *Eisen* also went on to quote, with approval, the ruling in *Mullane* that "process which is a mere gesture is not due process" because the "means employed must be such as one desirous of actually informing the absentee, might reasonably adopt to accomplish it." [55] The Supreme Court in *Mullane* expressly held—and the Court reiterated in *Eisen*—that publication notice does not satisfy due process whenever it is possible to use the mails to give actual notice. As put by the Supreme Court in *Eisen*:

> ". . . individual notice must be provided to those class members who are identifiable through reasonable effort." [56]

In the *Eisen* case itself, the facts showed that the names and addresses of 2,250,000 class members were ascertainable. The Court rejected the notion that the plaintiff's attorney could start a mammoth class action and then avoid Constitutional notice requirements because there would be considerable cost in providing individual notice to 2,250,000 members.

The proposed bill, in attempting to authorize publication notice rather than actual notice, is plainly contrary to the Supreme Court's *Eisen* opinion. Although the *Eisen* opinion relied primarily on Rule 23, the Court reiterated its endorsement of the earlier decisions requiring such notices as a matter of constitutional due process. Clearly the provision in H.R. 1284 for publication notice will provoke much litigation concerning its constitutionality, and even the strongest proponents of S. 1284 must concede that the notice provisions of the bill raise grave Constitutional questions.

V. The "General Economy" Issue is not a Matter of Parens Patriae and no Justification for This Feature has Been Presented

Under the proposed bill, a state attorney general would be authorized to sue as parens patriae for recovery of treble damages to the state's "general economy." The purpose is to overrule the recent Supreme Court decision in *Hawaii* v. *Standard Oil Co.*[57] In that case, the State of Hawaii unsuccessfully sought to recover damages, asserted to have been caused by an alleged antitrust violation, for such abstractions as: loss of state revenues, increased taxes on Hawaiian citizens to offset such losses of revenues, curtailment of opportunities in manufacturing and shipping, incomplete utilization of the State's natural wealth, loss of equal competitive access to mainland markets because of high cost of manufacture of goods in Hawaii, and frustration of State's measures to promote the general welfare of Hawaiian citizens.

In the House Hearings, Chairman Rodino suggested that parens patriae legislation is needed to "restore to the states their common law powers" to bring a parens patriae suit of the type rejected in *Hawaii*.[58] With all due deference, the suggestion that the Supreme Court in *Hawaii* took away a common law right is completely wrong. Under English Common Law, no such parens patriae action for damages ever existed, and in this country, our own courts have consistently and correctly refused to create such an action. This point was made emphatically by Chief Judge Lord of the Eastern District of Pennsylvania:

> ". . . (P)laintiffs' claim to recover damages as 'parens patriae' on behalf of individual citizens in an antitrust treble damage action under the Clayton

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52 Mullane v. Central Hanover Bank & Trust Co., Inc., 339 U.S. 306 (1950).
53 *See* 39 F.R.D. 98, *et seq.* (1966).
54 417 U.S. at 174.
55 339 U.S. at 315.
56 417 U.S. at 175.
57 405 U.S. 251 (1972).
58 Hearings on H.R. 12528 and H.R. 12921 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 93d Cong., 2d Sess., ser. 43, at 15 (1974).

> Act *is totally without legal support.* Not a single case called to the attention of the Court has allowed such a recovery, and the cases discussing this type of claim have consistently denied its validity." (Emphasis supplied.) [59]

In *Hawaii*, the Supreme Court traced the origin of the parens patriae doctrine from its common law concepts, as follows:

> "Traditionally, the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves. For example, Blackstone refers to the sovereign or his representatives as 'the general guardian of all infants, idiots, and lunatics,' and as the superintendent of 'all charitable uses in the kingdom.' " [60]

After noting that the parens patriae concept has been expanded in the United States beyond its common law origin, the Supreme Court than emphasized that parens patriae permits a state to sue only to "prevent or repair harm to its 'quasi-sovereign' interests . . . [arising] under common law rights of action" and that typically such parens patriae lawsuits are presented as "original suits" in the Supreme Court of the United States under Article II, Section 2 of the Constitution.[61] Put another way, the parens patriae concept authorizes a state to bring a common law action "*on its own behalf* and not on behalf of particular citizens." [62] The Supreme Court has on numerous occasions reiterated this same concept of parens patriae.[63]

The distinction between a parens patriae lawsuit and an antitrust treble damage case was crucial in *Hawaii*. As put by the Supreme Court:

> "The question in this case is not whether Hawaii may maintain its (parens patriae) lawsuits on behalf of its citizens, but rather whether the injury for which it seeks to recover is compensable under Section 4 of the Clayton Act. Hence, Hawaii's claim cannot be resolved simply by reference to any general principles governing parens patriae principles." [64]

To discuss the issue in terms of parens patriae is confusing and obfuscating. The real issue is whether the alleged abstract and speculative damages to a state's "general economy" is the type of injury which should be reached by our antitrust laws. Under Section 4 of the Clayton Act as it currently exists, antitrust treble damage suits provide triple compensation for all injuries suffered in the "business or property" of any person hurt by an antitrust violation. The Supreme Court reiterated its endorsement of the long string of cases which have held that the words "business or property" refer to commercial interests or enterprises, including such interests of any state government.[65]

Accordingly, the real question is not a matter of parens patriae. It is whether the concept of damages for antitrust violations should be vastly expanded to permit recovery for alleged injury to a state's "general economy," as distinct from injuries to the business and property of private persons who may recover for themselves under existing law. As the Supreme Court observed in Hawaii, such an extension would create a serious risk of duplicative recovery, because the injury to the state's "general economy" would be necessarily based on injuries to the business or property of consumers.[66]

Unlike parens patriae provisions in H.R. 38, the Senate bill attempts to reduce the danger of duplicative recovery by stating that any damages to the general economy "shall not be duplicative of those recoverable" by the state in a parens patriae lawsuit with respect to damages sustained by individual persons within the state. While the Chamber commends S. 1284 for recognizing the duplicate recovery problem, the risks of triple-damages doubled are far from eliminated, because as a practical matter any injury to the "general economy" would be necessarily reflected in the harm to individual persons. As put by the Supreme Court:

> "Even the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for

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[59] Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation, 309 F. Supp. 1057, 1063–64 (E.D. Pa. 1969).

[60] 405 U.S. at 257, citing 3 Blackstone, Commentaries *47. See also, Malina & Blechman, Parens Patriae Suits for Treble Damages Under the Antitrust Laws, 65 Nw. U. L. Rev. 193, 197 (1970): State Protection of its Economy and Environment; Parens Patriae Suits for Damages, 6 Col. J. L. & Soc. Prob. 411, 413 (1970).

[61] 405 U.S. at 258–59.

[62] Ibid. at no. 12.

[63] See, e.g., Louisiana v. Texas, 176 U.S. 1, 16 (1900) ("it must appear that the controversy . . . is . . . not a controversy in the vindication of grievances of particular individuals"); Pennsylvania v. West Virginia, 262 U.S. 553, 595 (1923) (the state's cause of action must be based on "an interest apart from that of the individuals affected.")

[64] 405 U.S. at 259.

[65] Section 4 also permits the Federal government to recover damages suffered in its capacity as a consumer of goods and services, but "not for general injury to the national economy or to the [Federal] government's ability to carry out its functions." 405 U.S. at 265.

[66] 405 U.S. at 264.

harm both to the economic interests of individuals and for the quasi-soverign interests of the State." [67]

By way of explanation, the Supreme Court observed that the "large and ultimately indeterminable . . . injury to the 'general economy,' as it is measured by the economists, is no more than a reflection of injuries to the business or property of consumers" [68] for which recovery is already authorized. The Court called attention to the extraordinary complexity that would be injected into antitrust cases for recovery for alleged injury to the "general economy." Such a case "necessarily involves an examination of the impact of a restraint of trade upon every variable that reflects that State's economic health—a task extremely difficult, 'in the real economic world rather than an economist's hypothetical model' ".[69]

The Supreme Court reiterated that in light of such extraordinary complexities, it is understandable that the antitrust laws do not "provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." All sorts of difficulties would be encountered, and settled principles of law—worked out over years of litigation—would be cast aside. For example, the Supreme Court recognized that overcharges in violation of antitrust laws might conceivably have an indirect effect on "increasing taxes, or reducing government services"; yet, under existing rules, "courts will not go beyond the fact of this injury to determine whether the victim of the overcharge has partially recouped its losses in some other way," *i.e.*, "a state, for example, may automatically recoup some part of the overcharge through increases taxes . . ." [70] All of these rules designed to simplify antitrust cases—which are already complex enough—would be put to one side under the proposals for recovery of the "general economy" of a state.

Before Congress adopts such a vast expansion of antitrust complexities, should insist, at the very least, upon clear and convincing proof that state governments have been substantially injured by antitrust violations and that existing laws do not provide for adequate recovery. In hearings before the House, the various states' attorneys general have asserted the theoretical possibility of loss of tax revenue or increased welfare payments, but none has submitted any concrete evidence that such alleged injury has in fact occurred.

The antitrust laws were designed to regulate business activities. These laws do not provide a potential cure for all economic ills. In short, the case for expanding antitrust to the "general economy" of a state has not been made.

VI. The Proposed Bill Would Unduly Complicate Antitrust Litigation in Other Respects

Existing antitrust laws are already subject to much criticism for undue complexity. The provisions of S. 1284 would vastly expand those complexities especially in the relationship between treble damage actions by private parties and those brought by a state attorney general under the proposed bill.

For example, the bill would pose mind-boggling questions for business corporations who might be injured by an antitrust violation. Under S. 1284, a state attorney general would be authorized to bring a treble damage action on behalf of all "persons residing in that state," and clearly the word "persons" includes corporations.[71] Assuming that the corporations somehow received actual notice of an action by the state attorney general, the question would arise as to whether the corporation is "residing" in that particular state. Does the term "residing" refer to the state of incorporation, or to the corporation's principal place of business, or to any state where the corporation does business or is licensed to do business, or to any combination of these possibilities? If the corporation wrongly concludes that it is not "residing" in a particular state and therefore does not opt out of the parens patriae suit of the attorney general of the state, the corporation would then be bound by adverse judgment under S. 1284.

Assuming that the term "residing" means the state of incorporation, S. 1284 is far from clear as to what damages could be recovered by the state attorney general with regard to business transactions occurring in *other states*. For example, is S. 1284 intended to authorize the attorney general of the State of Delaware to sue on behalf of all Delaware corporations with respect to their antitrust

[67] Ibid.
[68] Ibid.
[69] 405 U.S. at 263, n. 14, quoting Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 491, 493 (1968).
[70] Ibid.
[71] 15 U.S.C. § 12.

damages relating to sales occurring anywhere in the Country? The answer is far from clear.

If the word "residing" is somehow to be limited to a corporation's transactions occurring within the boundaries of a single state, this could lead only to piecemeal litigation. A corporation engaged in business transactions throughout the country would find its claims being divided among some fifty states' attorneys general. Moreover, since S. 1284 provides that the final judgment in all actions by a state attorney general "shall be *res judicata*," the multiplicity of lawsuits could lead to endless battles under the complex doctrine of *res judicata*. There could likewise be much confusion if a corporation operating in several states decides to "opt out" of the parens patriae litigation started by one attorney general, and bring his own separate antitrust treble damage case, while not opting out of the parens patriae lawsuits of a second state's attorney general.

There would inevitably be numerous complicated questions under the "passing on" defense. According to the Supreme Court, the passing on defense applies if the defendant can show that the plaintiff "raised his price in response to the illegal overcharge"; that the plaintiff's margin of profit and sales volume did not decline; and that the plaintiff would not have raised prices absent the overcharge.[72] Under the proposed parens patriae provisions, the state attorney general could sue on behalf of *all* business corporations involved in a manufacturer's distribution arrangement, including converters, wholesalers, retailers, and even consumers. It is clear that often the interests of these diverse groups will not be harmonious, particularly under the passing-on defense. Yet, if this highly complex question of passing-on is not faced, the likelihood of triple-damages doubled is apparent.

The broad scope of S. 1284 could lead to still other complexities. Although supporters of S. 1284 typically recite the theoretical possibility of illegal price-fixing conspiracies that harm the states' general economy, the bill is not limited to such hard-core antitrust violations. Instead, S. 1284 would extend even to the most esoteric type of violation conceivable under the Robinson-Patman Act—where what is lawful or unlawful may not be known until after a full trial.

In the absence of a strong showing of the need for new legislation, Congress ought not to inject these additional complexities into antitrust cases.

VII. The Asserted Class Action Problem is not an Antitrust Matter

As has been stated previously, the "problem" which parens patriae bills are designed to solve concerns cases in which members of the class are great in number but their individual claims are small in dollars. Although a few antitrust cases possibly fit this particular mold, the perceived problem is by no means unique to antitrust. It runs the full gamut of all class action litigation, including litigation under civil rights laws, securities regulations, labor statutes, and welfare laws.

This point was underscored by the recent Class Action Study prepared in 1974 by the Staff of the Senate Commerce Committee.[73] As part of a comprehensive two-year study, the staff conducted a systematic review of all class actions filed in United States District Court for the District of Columbia during a six and one-half year period, from July 1, 1966 through December 31, 1972. The study disclosed that there were 353 class actions, which fell into the following categories:

Civil rights	114
Consumer	31
Welfare	41
Labor	55
Securities	3
Antitrust	6
All other	103

The above data represents an actual profile of all class actions within one of the busiest Federal districts, which ranked fourth among all Federal courts in the number of class actions pending in 1972. As the above data shows, antitrust class actions accounted for less than 2% of all the class actions involved in the study. If class actions not seeking damages are eliminated from the above data, antitrust cases account for only five out of a total of 120, or about 4% of the class actions for damages.

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[72] Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 491 (1968).
[73] Cited herein as "Class Action Study".

In commenting on the legislative implications of the class action study, the staff personnel concluded "that most class actions proceed with reasonable smoothness in the Federal courts." It was suggested, however, that there may be a few cases which become "difficult or impossible" to manage under the present procedures of Rule 23. The staff identified these as cases which involve "both very large classes and small individual claims" and then went on to observe that this is "a problem not uncharacteristic of some *consumer class action litigation*.[74] (Emphasis supplied.) Thus the legislative staff recognized that whatever may be the scope of the problem encountered in only a *few* cases where manageability is a serious obstacle under existing laws, this is not an antitrust problem—but a consumer class action matter.

While the National Chamber does not necessarily concur with all of the legislative suggestions in the staff's report, it does agree with the basic proposition that *if* there is a problem, it is a consumer class action problem—not an antitrust problem. It would be a mistake to approach any such problem as might exist on a piecemeal basis for antitrust, or civil rights, or welfare, or labor. For this reason alone, Title IV should be eliminated from S. 1284.

VIII. Conclusion

The Chamber respectfully suggests that the asserted class action "problem" is at best theoretical and does not justify any new legislation. If Congress nevertheless proceeds to consider new legislation a far simpler solution would be a bill authorizing each state attorney general to sue as a class representative under existing class action safeguards, irrespective of whether the state qualifies as a purchaser or has been injured in its proprietary capacity.

In any event, it is suggested that the policy question posed in the Legislative Staff's Class Action Study by the Senate Commerce Committee should be resolved prior to drafting of any new legislation. The Legislative Staff's Study concluded that if there is a problem, it is a consumer class action problem— and that any new consumer class action statute could be justified only in terms of compensation to injured consumers, prevention of unjust enrichment, and deterrence. These are laudable objectives which the Chamber endorses and which are often cited by supporters of the parens patriae bills. Yet, the Legislative Staff's Study recognized that all of these objectives may not be achievable. As put by the Staff:

> "Most large cases with small individual claims are particularly apt to be unmanageable if their chief purpose is viewed as individual compensation." [75]

As previously noted, a massive lawsuit would be no more manageable merely because it is presented under the umbrella of parens patriae or merely because Congress passes a new law authorizing unmanageable litigation.

According to the Staff's analysis, Congress is faced with a policy choice. (1) Congress may retain individual compensation as the primary purpose of class actions, in which even Congress would be "secure in the knowledge that in a large number of cases the resulting *litigation will fully accomplish that statutory* purpose under present Rule 23", but Congress should "accept the fact that *individual relief is not feasible in all class suits.*" [76] (2) Alternatively, in those cases where individual relief is not feasible, Congress may examine legislation to achieve other legitimate goals, such as "prevention of unjust enrichment and deterrence . . . when significant individual recovery is not possible." [77]

The staff went on to conclude that after Congress has made the basic policy decision between the competing interests identified above, then Congress "must design carefully the enabling procedures included in any consumer class action bill" so as to implement the policy decision made.[78]

The proposed parens patriae legislation needs far more study and consideration. In their present form, these bills should be rejected.

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[74] Class Action Study at 30.
[75] Class Action Study at 31.
[76] Ibid (emphasis supplied).
[77] Ibid.
[78] Ibid.

Consumer Statement of Claim Approved
in California v. Frito-Lay

CONSUMER STATEMENT OF CLAIM

TO: OFFICE OF THE CLERK, UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
P. O. BOX 76552
LOS ANGELES, CALIFORNIA 90076

23903

IN RE PRIVATE CIVIL TREBLE DAMAGE ACTIONS AGAINST CERTAIN SNACK FOOD COMPANIES No. 71-2097 R

PRINT YOUR NAME — last name — first name — middle initial

PRINT YOUR ADDRESS — street number — street name — apt number

PRINT YOUR CITY, STATE AND ZIP CODE — city — state — zip code

SOCIAL SECURITY NUMBER — none — Date of Birth — Month — Day — Year

Claimant was a consumer residing in the State of California, Arizona or Nevada who made purchases of potato chips, barbecue-flavored potato chips, corn chips and tortilla chips for his and/or members of his household consumption during the period January 1, 1967 to December 31, 1970.

1. How many persons, including yourself, were in your household during the period January 1, 1967 through December 31, 1970?: ____

2. State the name of each person that was in your household during the period January 1, 1967 through December 31, 1970. ____

3. How much did you spend per month, on the average, for total food purchases for your household during the period January 1, 1967 through December 31, 1970?: ____

4. How much did you spend per month, on the average, to purchase potato chips, corn chips, barbecue flavored potato chips or tortilla chips for your household during the period January 1, 1967 through December 31, 1970 in California, Arizona or Nevada?:
Under $1.00 ☐ $1.00–$3.00 ☐ Over $3.00 ☐

I declare under penalty of perjury that the information contained in this claim form is true and correct to the best of my knowledge and belief. I recognize that a knowingly and materially false statement if made herein is the felony of perjury under 18 U.S.C. 1621 and that knowingly making a materially false statement to an adjudicatory agency of the United States Government is a felony under 18 U.S.C. 1001, both of which are punishable by imprisonment and fine.

Dated. ____ ____ (Signature of Claimant)

Only one claim may be filed per household. This claim must be postmarked no later than April 21, 1975.

(Caveat. The total figure set forth herein is not determinative of the amount due each claimant, but shall be used only to determine the amount claimant shall receive as a pro rata basis of the settlement fund.)

TITLE V: PREMERGER NOTIFICATION

While Title V is headed, "Premerger Notification," it goes much beyond requiring corporations contemplating mergers to "notify" the FTC and the Assistant Attorney General in charge of the Antitrust Division (AAG). It requires the filing of information of undefined scope bearing on the legal propriety of the proposed merger; and it gives the FTC and the AAG virtual licensing power over the proposed merger. Its impact is not limited to mergers; it covers any sale of an asset (which, literally read, could be from inventory) by a person engaged in commerce to another person engaged in commerce. It also confers power to prescribe accounting methods.

I. Title V Would Give The Government Licensing Power Over Mergers

This title would add a new Section 23 to the Clayton Act to prohibit any person designated by the Federal Trade Commission (Section 23(a)(3))[79] from acquiring "any part . . . of the assets of another person" (Section 23(a)) without filing, in duplicate originals with the FTC and the AAG a document containing "such information and documentary material as the Federal Trade Commission . . . shall by general regulation prescribe . . ." (Section 23(b)(2)). In case the original general regulation overlooks anything, Section (c)(1) would authorize either the FTC or the AAG to require the filing of "additional information and documentary material."

[79] There are some dollar requirements specified in Section 23(a), but the FTC is given plenary power to change them. Section 23(b)(4).

There is, obviously, an inherent problem in drafting a premerger notification law. Section 7, like the present proposal, applies to acquisitions of assets, but with the qualification that the acquisition must substantially lessen competition—a qualification which rules out ordinary commercial transactions. But the present proposal wants to leave the FTC–AAG free to make their own determination of whether or not *any* transaction whatsoever violates Section 7. There is no way we can see to give them the premerger notifications they want without authorizing them to demand—as the bill does—advance notice of every commercial transaction.

These provisions are innocent of any requirement that the proposed acquisition be an acquisition in the nature of a business merger or have any effect on competition. Consider a literal-minded example. If a person engaged in commerce acquires a popsicle from some other person engaged in commerce, the required document must be filed, unless perchance the FTC, in the merciful exercise of the plenary power conferred upon it, should ". . . by general regulation except classes of persons and transactions from the notification requirements thereunder . . ." (Section 23(b)(4)). In other words, under Title V, ordinary commercial buying and selling in the United States could require leave and license from the FTC.

If an exception is not granted by the FTC, our popsicle purchaser would have to wait 60 days [80] before carrying out his acquisition—unless the FTC or the AAG asked further information and more documents and extended the period another 30 days, to 90 days. Section 23(c)(2). Or the FTC and the AAG might manifest their grant of a merger license explicitly instead of *sub silentio*, by waiving the 60–90 day waiting period and publishing notice in the Federal Register—not, of course, that they *approve* the merger—but rather that neither "intends to take any action in respect to the acquisitions."

Title V does not make an acquisition illegal if the FTC and the AAG withhold their consent; it merely provides that the acquisition is to be put on ice *pendente lite*. The risk that a Federal Court might differ with the FTC–AAG view (or that they might differ with each other) is resolved in favor of requiring a Federal Court, on application, to order the acquiring firm ". . . to maintain the personnel, assets, stock or firm being acquired as a separate entity, and requiring the profits of the acquired firm, stock, or assets to be placed in an escrow account, pending the outcome of the proceeding or action."

Such orders are common in present-day litigation under Section 7 of the Clayton Act. But there are qualifications:

(a) The District Court today has discretion in framing the order, so that the ordinary business operations of the acquiring and acquired companies can be conducted in a businesslike way during the pendency of the action. The new "separate entity" and "profits escrow" requirements may well not be consistent with viable operation of the acquired firm. After all, a common reason for selling out is unprofitable operations; and some flexibility ls required in these "freeze" orders to make it possible for the acquiring company to correct the cause of the acquired company's lack of success. Given the five to ten year time period normal to Section 7 litigation, Section 23(g) confers a veto power on the FTC and AAG except in the cases where an inflexible 23(g) order might perchance be appropriate.

(b) Today, an acquiring company in a disputed Section 7 situation has the burden of the risk that the acquisition may be a loser—as many of them are. An acquiring company also has the benefit of the possibility that the acquired company may increase in value *pendente lite*—and in a few cases this has indeed occurred. Apparently these few cases have stirred up some resentment, because the proposed Section 23(g) provides that in case the Government wins its Section 7 case, the acquired company has to be sold "at a price not to exceed the purchase price," and apparently all "profits held in escrow" are to be thrown in free!

(i) There is no provision as to how the lucky buyer of a forced divestiture below the fair market value of the divested entity is to be selected—whether by the divesting company, the District Court, the AAG, or some other government entity.

(ii) There is no provision preserving to the unlucky loser of a Section 7 case the appreciation in dollar value resulting from (a) inflation of the currency by the party plaintiff, (b) improved management by the acquiring company, or (c) additional investment by the acquiring company in the modernization and improvement of the acquired property.

It seems evident that the total effect of these provisions is to make it commerically impossible to proceed with a merger transaction of which either the FTC or the AAG disapproves. Title V blocks effective judicial review of their regulatory action.

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[80] Section 23(b)(3) uses a waiting period of "at least 30 days" for acquisitions involving only small companies: but it is ambiguous as to whether the 30-day period could be increased by FTC.

II. Title V Would Authorize Government to Prescribe Accounting Systems

A further extension of FTC–AAG power is found in Section 23(b)(4), whereby the FTC, after consultation with the AAG, "is authorized and directed . . . to prescribe accounting methods for reporting thereunder . . ."

A provision giving a Government agency general power to prescribe accounting methods for unregulated industry is wholly unwarranted. Such requirements are common in regulated industry; and the experience in regulated industry is such that few accountants indeed want to extend the use of agency-prescribed accounting methods to new fields.

The problem with bureaucratic control of accounting methods is, as with bureaucratic control of everything else, a lack of adaptability to change and individual circumstances. The accounting profession is, for exemple, presently wrestling with the problem of adapting accounting systems to the effects of continuing inflation—and nothing could be more unwelcome than an FTC non-solution to the problem.

The SEC has worked extensively with the development of accounting standards; but despite—or perhaps because of—its far greater familiarity with accounting problems, it has rarely undertaken to prescribe accounting methods, whether for reporting under the Securities and Exchange Act or otherwise.

The fact that the FTC-prescribed methods would apply "only" to reports filed under Section 23 is no answer to the problem. Modern business being what it is, no person engaged in commerce could deliberately use an accounting system which precluded it from filing under Section 23—especially since Section 23 requires filing on all acquisitions of assets—even a popsicle, as pointed out above—unless FTC makes some exceptions to the requirement.

An intention to engage in merger activity is thus not the only possible condition precedent to a need to file under Section 23. In terms of the *power* granted to FTC, the exception of transactions of purchase and sale in the ordinary course of business (discussion above) could well be allowed only on condition that the company seeking the exception file, say, line of business reports in accordance with FTC prescribed accounting methods.

The reports being public documents, the filing company would face a dilemma: Either publish a set of reports on accounting principles suited to its business for filing under SEC-administered legislation, and then undertake to explain the differences appearing on FTC filings; or use the FTC methods for both—however inappropriate those methods might be.

III. General Comments

The view of the National Chamber on premerger notification are influenced by the belief that the great majority of merger-type transactions are economically healthy, reflect the process of business entry and exit vital to the free enterprise system, and should not be the subject of Government intervention except when, in the language of Section 7 of the Clayton Act, they result in substantial lessening of competition.

Only a very small percentage of mergers has the prohibited effect; the great majority represent the processes of competition at work. There is no showing of a need to burden ordinary business transactions with an elaborate reporting-and-delay system in order to catch the violations of Section 7; mergers—especially big ones—are widely reported in the financial press, and they do not lend themselves to concealment or conspiracy.

No merger problem.—The proposed legislation incorrectly assumes the existence of a "merger problem". According to the latest authoritative figures of W. T. Grimm & Co. of Chicago announced on April 8, 1975, mergers and acquisitions in the calendar quarter ending March 31, 1975 decreased by 34% over the comparable 1974 quarter. More importantly, this was the ninth successive quarterly decrease in merger activity.

What is even more important is the fact that the size and nature of mergers and acquisitions have changed substantially in recent years. The Grimm report indicates that during the first quarter of 1975, 290 of 575 mergers, or nearly 51%, involved the "sale of a product line, division or subsidiary of a parent company." The attached article of April 21, 1975, from *Business Week* confirms that most current merger and acquisition activity involves divestitures necessitated by economics; they are, in effect, distress sales.

In other words, the proposed legislation is aimed at a non-existing "problem" of big corporations supposedly gobbling up small corporations and increasing industrial concentration, whereas it would have the clear effect of making it

difficult if not impossible for corporations to become smaller by divesting operations which do not fit the finances or operations of the selling company.

Two sides to every merger.—There are two sides to every merger or acquisition—the selling party as well as the acquiring party. Most merger transactions, in fact, are initiated by parties wanting to sell their business. Very often they have estate problems, tax problems, financial problems, etc. They often lack family successors; their sons have opted for careers in medicine or law, for example, rather than the family business. The proposed legislation would make it difficult if not impossible for such parties to dispose of their businesses normally. What is more, in the case of death of the business owner, the time delays involved in the proposed legislation would cause severe damage to the business pending divestiture.

Proposal anti-competitive.—The proposed law is actually anti-competitive. Most mergers are a normal expression of the competitive, free enterprise process, in which many entrepreneurs or innovators desire to sell their businesses in order to reap the reward for their development efforts; still others exit because they have been unsuccessful in waging competition. Whatever the reason, their exit usually presents an opportunity for the entry of new competitors. This occurs in all but the most capital intensive markets. By freezing or clogging exit channels, the proposed legislation would clog the normal channels of entry that have long existed. It is no accident that times of prosperity are accompanied by more mergers and acquisitions than times of recession and depression. At the same time, periods of prosperity witness a vast upsurge in the successful entries of new business. A great part of the incentive for the entry of new business is the potential for some day selling the new business at a profit. Thus, mergers and acquisitions and new business entries are evidence of a healthy economy. It is only the few anti-competitive mergers and acquisitions that should be prevented.

Timely notice available.—For six years the Federal Trade Commission has conducted a pre-merger notification program under existing law. Further, almost universally, meaningful merger and acquisition intentions are promptly reported in the press. No evidence whatsoever has been presented of increases in concentration or injuries to competition resulting from lack of timely pre-merger information.

Denial of constitutional rights.—The automatic injunction and the waiting period provisions amount to a denial of due process of law. By administrative fiat—without hearing, without any proof of violation and without opportunity for a court to exercise any discretion whatsoever—any acquisition can be barred for the duration of the case. Long time delays resulting from injunctions will involve inevitable changes in business conditions and values of assets or securities and will force abandonment of mergers. The waiting period provisions would have a similar effect. Together, they amount to an improper restraint on the alienation of property, which is in effect the taking of property without due process of law.

Injunctive relief already available.—The law already provides for injunctive relief in antitrust cases. Sherman Act, 15 U.S.C. Sec. 4; FTC Act, 15 U.S.C., Sec. 53; All Writs Act, 28 U.S.C. Sec. 1651(a). But the granting of such relief is in the discretion of the court. Traditionally, some showing of need and probability of harm have been required for the granting of such relief. Injunctive relief has been granted in various forms in a number of merger cases. Courts also have denied injunctive relief in merger cases, recognizing the great harm that can be done to the parties as a result of delays in consummating a transaction. There is no showing that statutory procedures have not been adequate.

Small minority of mergers illegal.—Title V appears to be based on the assumption that all mergers are entered into in complete disregard of the antitrust laws and that therefore, extraordinary powers must be granted to the FTC and the department of Justice to prevent a flood of illegal mergers. In fact, corporations of any significant size, when contemplating an acquisition, exhaustively analyze the antitrust aspects both prior to and during negotiations. Only a very small number of mergers which take place result in proceedings being filed and in a lesser number is the government successful.

IV. Conclusion

The powers granted to the authorities by Title V are so sweeping as to drastically inhibit acquisitions or divestitures. There is no showing that the present powers of the authorities are not adequate to deal with those mergers which in fact violate Section 7. The inhibition of acquisitions may be anticompetitive in that effective allocation of capital resources and the entry and exit of competitors will be restricted. The National Chamber opposes the proposal.

Attachment—Title V: Premerger Notification

[From Business Week, April 21, 1975]

A coast-to-coast sampling of companies looking for a buyer

Corporate parents	*. . . With holdings on the block*
Certain-teed Products Corp., Valley Forge, Pa.	Realtec, Inc., a land developer, plus a dozen other 'investments'
Consolidated Foods Corp., Chicago	Fuller Brush Co. Authentic Furniture B.P. John Furniture Gem Furniture Good Tables-Woodland Furniture
Continental Investment Corp., Boston	Waddell & Reed, Inc., Kansas City mutual fund and insurance company Investors Mortgage Insurance Co., Boston
Downe Communications, Inc., New York	Founders Funds, Denver
Evans Products Co., Portland, Ore.	A housing-oriented list that includes Evans' Canadian Div., plywood, hardwood, and plastics operations, and seven facilities for making precut homes
General Foods Corp., White Plains, N.Y.	Viviane Woodard Corp., home-sold cosmetics
Genesco, Inc., Nashville, Tenn.	S.H. Kress, variety stores
Mattel, Inc., Hawthorne, Calif.	Ringling Bros.-Barnum & Bailey Combined Shows, Inc.
Norris Industries, Inc., Los Angeles	Pressed Steel Tank Co., high-pressure tanks for industrial gases

Acquisitions—An Urge To Purge Misfit Operations

Like many other U.S. corporations recently, Consolidated Foods Corp., the giant Chicago-based conglomerate, has gone back to the drawing board. Last week, Consolidated put its wholly owned Fuller Brush Co. and four assorted furniture makers on the block, suggesting that they might fit more comfortably into some other corporate bag. The "for sale" sign on Fuller Brush, however, is only one of a forest that has sprung up on unwanted divisions, subsidiaries, and once-prized acquisitions as corporations trim for difficult times.

W. T. Grimm & Co., Chicago-based merger brokers, noted this week that of the 579 merger announcements in the first quarter, 290, or nearly 51%, "pertained to the sale of a product line, division, or subsidiary of a parent company." And there are plenty more on the market. "Every major company," says Cambridge (Mass.) merger consultant James N. Kelly, "has something they'd like to get rid of—at the right price." An East Coast manufacturer says he hears from "two companies a week wanting to sell us something."

While the number of successful deals rose in the first quarter, the problems of the business downturn, liquidity crunch, disarray in the equity markets, and a growing corporate wariness of straying into unknown areas have left a lot of holdings lingering on the vine. Mattel, Inc., the West Coast toy maker, is still seeking a buyer for the Ringling Bros.-Barnum & Bailey Combined Shows and a partly built Circus World park near Orlando, Fla. Both appeared sold to the Gulf Oil Corp. last year until its board balked at the idea. Genesco, Inc., has been unable in two years to sell the 188 S. H. Kress variety stores, although they broke even last year on sales of $120-million after a $9-million loss in 1973. This week, a spokesman conceded that, if a buyer is not found, Genesco may simply reabsorb Kress back into its operations.

Change of tactics.—In less stringent times, merger brokers feel, Consolidated Foods probably would have handled the proposed sale of Fuller Brush and the furniture companies more discreetly, waiting until a deal was close before announcing it. Last week, the company mentioned neither an asking price nor a potential buyer, and John H. Bryan, Jr., president and chief executive officer, said the company has written off about $28-million to cover its probable losses. "It was kind of an unusual way to go about it," says W. T. Grimm, the Chicago merger broker. Given Consolidated's experience at dealing in and out of acquisitions, others in the field suggest that it may have exhausted the more normal means of quiet negotiation before broadcasting its intent.

A major Philadelphia company with a \$25-million subsidiary it would like to shed is going about it more secretly, and with reason "We never want to talk about it," says a spokesman. "Somehow news that it was for sale leaked out a while back, and the price was immediately cut in half. We were interested in continuing the charade that it was a healthy division and that we would shed all sorts of tears to lose it when, in fact, we'd have been happier than hell to get rid of it."

For several luckier corporations, the task of reshaping the company disacquisition has been accomplished with minimal trouble. Two weeks ago, Insilco Corp., the Connecticut parent of International Silver and others, wound up the sale of the last two of eight subsidiaries it wanted to shed. "On a combined basis," says Executive Vice-President Lawrence J. DeGeorge, "we have sold companies totaling about \$70-million in sales and under \$1-million in net profit after taxes for about \$38-million. We have been trading up . . . We deployed the capital in them to more productive, higher-yielding uses."

Forced Issue.—Fully aware of the problems of selling high-dollar subsidiaries in the current economic environment, Phillips Petroleum Co. mounted a six-man team to find a buyer for its 900 West Coast service stations and a California refinery that it was under court order to sell. Proving that in the oil industry, at least, such a task is not impossible, Phillips has now signed a letter of intent with The Oil Shale Corp. for sale of the properties. The hardest part, according to Robert S. McConnell, assistant to the president and head of the disacquisition team, was finding a company small enough to pass muster with the Justice Dept. yet big enough to afford to buy. "You have to walk a tight line between these two requirements," he says, "and it makes the sale of assets this large very difficult."

Forced divestitures, indeed, have helped cram the market with available subsidiaries and have created some of the more disgruntled sellers. H. Jack Meany, president of Los Angeles-based Norris Industries, Inc., is one. Norris consented to a federal decree last February to shed its Pressed Steel Tank Co., a Milwaukee maker of compressed gas containers, which, according to Meany, Norris Industries raised from a "marginal operation" to a "growing and profitable" company of \$6-million assets. "We'd hate at any time to have to sell," he says, "but this is the most inopportune time I can imagine. A year or two ago we could have expected to get 10 to 15 times earnings; now we're hoping for 6 to 8." Partly because of the reduced asking price, however, Meany foresees no problem selling.

For other sellers, however, the chase eventually becomes not worth the effort. Scott Paper Co., for instance, had its paper and plastic cup division and a ski resort up for sale. Last November, when no buyers had been unearthed, Scott simply discontinued the \$10-million division, taking a \$1.7-million after-tax loss. Then, when no one else would take it, Scott gave its "Squaw Mountain at Moosehead" ski resort outright to the state of Maine. The gift included 2,300 acres of woodland and a 55-room resort hotel.

TITLE VI: NOLO CONTENDERE

Despite appearances, what is really being proposed under Title VI of this bill is the elimination, in practical effect, of the alternative of entering a plea of *nolo contendere* in criminal antitrust proceedings.

Those in favor of such a change generally argue that the plea of *nolo* is a "loophole," the limination of which would provide great benefits to the private litigant and vastly improve the over-all efficiency of antitrust enforcement. Each of these assumptions if fallacious.

To begin with, the plea of *nolo contendere* is not a legal "loophole." It is an important tool—just as important as its civil equivalent, the consent decree—for the pragmatic and efficient enforcement of the antitrust laws. The same penalty may be adjudged as upon a conviction by guilty plea or verdict. *Hudson* v. *U.S.*, 272 U.S. 451 (1926); *United States* v. *Food & Grocery Bureau of Southern Cal.*, 43 F. Supp. 974, 979 (S.D. Cal. 1942). Most importantly, a defendant has no automatic right to a plea of *nolo contendere;* acceptance or rejection is a matter of descretion with the court, as provided by Rule 11 of the Federal Rules of Criminal Procedure. Such pleas, for example, were rejected in the so-called electrical cases *United States* v. *Westinghouse Elec. Corp.*, 1960 Tr. Cas. Par. 69,699 (D.C.E.D. Pa. 1960).

In determining whether to accept the plea, the courts have considered various practical factors relating to whether or not the public interest would be better served by its acceptance or rejection. Such factors include the court's docket and the savings to the government of the tremendous expense involved in a trial.

United States v. *Safeway Stores*, 20 F.R.D. 451 (N.D. Tex. 1957). The enforcement of the antitrust laws must take place within a world of not unlimited time and resources. The practical value and necessity of the pleas of *nolo contendere* were both seen and intended by Congress. *Twih Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366 (Minn. 1939).

These realistic provisions dispense with lengthy and expensive trials and allow the Justice Department's Antitrust Division to spread its resources and to provide considerably more extensive enforcement. The impact of the proposed legislation on the courts, the Justice Department and antitrust enforcement generally, as a result of the burden of having most cases go to trial would be highly counterproductive.

Aside, from these practical considerations, judges, in exercising their discretion, consider various mitigating factors in determining whether to accept a *nolo contendere* plea. These factors include the following:

(a) The gravity and nature of the offense should be considered. Antitrust actions are sometimes brought under novel theories. Whether certain business practices overstep legal boundaries can frequently be a matter over which lawyers and judges have justifiable disagreements. Violations may be unintentional.

(b) Win or lose, long antitrust trials may generate considerable adverse publicity for the defendant as well as baseless litigation by private parties.

(c) The government's case may be such that the likelihood of the government prevailing is highly uncertain.

(d) The health of individual defendants and the costs of trial to individual and corporate defendants may make it disadvantageous to go to trial despite a total belief in their innocence.

The weight and application to be given to any combination of these factors is a matter best left to judicial discretion. The proposed legislation is nothing less than an attempt to legislatively usurp a proper function of the judiciary with a blanket rule that cannot possibly be as fair or just as the present evaluation by the judiciary of each case on its own individual merits.

And what of the practical benefits allegedly to be expected from the passage of Title VI? Just how much time, effort and expense would be saved the private litigant by virtue of the availability of *prima facie* evidence derived from those *nolo contendere* pleas that are accepted by the court? Upon close analysis, the answers to these questions are not those assumed by the proponents of this legislation.

The use of *prima facie* evidence would not appreciably decrease the process of pretrial discovery or evidentiary submission at trial. Nor can it be expected to substantially decrease the length of time from inception to ultimate disposition of antitrust litigation or, for that matter, the actual length of the trial itself.

No experienced lawyer would limit his case to the simple demonstration of injury and proof of damages to his client while relying solely on the relevant portions of an indictment and guilty plea to establish the defendant's liability.

The government need not, and may not, for a variety of reasons, press for an indictment which covers the full scope and depth of an alleged antitrust conspiracy. A lawyer seeking treble damages for his client simply cannot afford to rely on the guilty plea which might well cover only a small portion of the suspected conspiracy or a portion of the four-year statutory period or, for that matter, on a prior government record which might prove less than he needs to sustain his claims. As a result, the plaintiff's attorney will, regardless of the type of plea, seek as extensive discovery as he can get and place before the trier of fact at trial the full array of evidence.

On the other side of the case, defendants, regardless of the type of plea, can reasonably be expected to attempt to establish, through extensive rebuttal evidence and testimony, that the violation was limited in scope, area of application, duration and impact.

Finally, the use of *prima facie* evidence, rather than saving time and reducing complexity may, in fact, increase it, since there must be the difficult process of the trial court's determination and subsequent appeals on the issues as to precisely which facts and issues the previous government case had adjudicated and established.

It is a misconception to believe that the availability of *prima facie* evidence would make private litigation any quicker or less expensive for the private plaintiff. The primary purpose of Title VI is, clearly, to make available to treble damage plaintiffs the benefits of a *prima facie* case and admissions implied from a plea of guilty. Since the enactment of the Clayton Act of 1914, two factors have made this proposed change of considerably less value to plaintiffs:

(a) The development of modern methods of discovery under the Federal Rules of Civil Procedure have given plaintiffs much stronger tools than they had in 1914 for developing evidence of antitrust violations. There is no longer any serious hardship in requiring plaintiffs to proceed on the basis of the evidence, unaided by implications from pleas in proceedings by the United States.

(b) More recently, the development of class action remedies and the growth of the treble damage bar have created a race to the courthouse by treble damage lawyers, who, in their haste to be first to file, are likely to move as soon as the Antitrust Division announces the filing of its own complaint. The nature of the pleas entered by defendants have less and less to do with the institution of treble damage actions, which today tend to be brought in advance of the entry of a plea.

Most treble damage cases end in settlement. Title VI would make it more difficult for defendant business concerns who are anxious to dispose of antitrust cases expeditiously to get the criminal cases behind them with *nolo* pleas and would give treble damage plaintiffs a somewhat synthetic weapon for increasing settlements, irrespective of the actual evidence of violation and damgaes. Its tendency would be to add cost, prolixity, and complexity, without increasing the likelihood that justice would be done.

TITLE VII: MISCELLANEOUS

Title VII of S. 1284 is a miscellaneous section which would:

(1) extend the reach of the Robinson-Patman Act and Section 3 and 7 of the Clayton Act to activities "affecting" commerce;

(2) require expedited handling of civil antitrust cases certified as "complex" by the Attorney General and provide for the appointment of special masters, economic experts and other personnel to assist the trial judge in such cases; and

(3) permit the imposition of sanctions, including the dismissal of claims or the striking of defenses, on any party who refuses to furnish discovery or testimony on grounds that foreign law prohibits compliance.

We believe that these provisions are unnecessary and are not "improvements"

Section 701

Section 701 would strike out the words "in commerce" wherever the term appears in the Robinson-Patman Act and in Sections 3 and 7 of the Clayton Act and insert in lieu thereof the words "in or affecting commerce". Last year a virtually identical amendment was made in the Federal Trade Commission Act by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.

The Supreme Court has held that Congress intended to exercise the full extent of its commerce power in the Sherman Act, which is keyed directly to effects on interstate markets and the interstate flow of goods. *United States v. South Eastern Underwriters Association*, 322 U.S. 553 (1944). In contrast, the explicit language of the Clayton and Robinson-Patman Act provisions extends only to persons and activities that are themselves within the flow of interstate commerce. Arguably, therefore, the jurisdictional requirements of these provisions cannot be satisfied merely by showing that anticompetitive activities *affect* commerce. The proposed amendment is apparently intended to extend the reach of these provisions to the full extent of Congress power under the Commerce Clause to all activities having a substantial effect on interstate commerce.

We question the wisdom of expanding the reach of the Robinson-Patman Act at a time when its provisions have been the subject of persuasive criticism. Economists are becoming increasingly convinced that the Robinson-Patman Act is anti-competitive, limiting competition rather than promoting market efficiency. The Robinson-Patman Act has been strongly criticized by two recent Presidential Commissions: the Neal Commission appointed by President Johnson and the Stigler Commission appointed by President Nixon. The Act was again criticized in the annual report of the Council of Economic Advisers, transmitted with the *Economic Report of the President*, to the Congress, February 1975.

The present jurisdictional reach of the Robinson-Patman Act has been defined by the case law to reach only those transactions where at least one of the two transactions involves a discrimination across state lines. This interpretation was recently confirmed by the Supreme Court in *Gulf Oil Corp. v. Copp Paving Co.* —— U.S. —— (1974). We submit that Congress should undertake a thorough reevaluation of the Robinson-Patman Act before enacting legislation which would significantly expand the reach of this statute to cover essentially intrastate conduct.

The present jurisdictional reach of the Clayton Act is not clear. In *Gulf Oil Corp. v. Copp Paving Co., supra,* the Supreme Court declined to reach the question whether the reach of the "in commerce" language in Sections 3 and 7 of the Clayton Act was coextensive with the reach of the Commerce Clause. However, this issue is now before the Supreme Court in *United States v. American Building Maintenance Industries* (No. 73–1689), where the United States is arguing that the Clayton Act should be accorded the same reach as the Sherman Act, i.e. to all activities which substantially affect interstate commerce.

The question whether the jurisdictional reach of the Clayton Act should be expanded differs from the question before Congress in expanding the reach of the Federal Trade Commission Act, which the Chamber supported. It was recognized that this additional grant of power to the Federal Trade Commission would not cause the Commission to lose sight of the fact that the vast preponderance of local marketing practices were primarily the concern of state and local governments and enforcement agencies. Expansion of the reach of the Clayton Act raises the question of whether the amendment would encourage private litigation under the federal antitrust laws which would be more properly filed in state and local courts under state and local laws governing local trade practices.

We submit that Congress should await the clarification of the reach of the Clayton Act by the Supreme Court in *United States v. American Building Maintenance Industries, supra,* before giving further consideration of the need for Congressional action to expand the jurisdictional reach of the Clayton Act.

Section 702

Section 702 would add a new section to the Clayton Act to provide expedited handling of civil actions brought by the United States for injunctive relief if the Attorney General certified the case as "complex". We question the wisdom of such a special provision for antitrust cases that does not establish any general order of priority for cases pending in the federal courts. Would this provision require criminal cases, civil rights litigation, enviromental or other litigation to await disposition of complex antitrust cases? It seems to us that the proposed provision could lead to unfair and discriminatory priority for government antitrust cases.

The federal judiciary has already adopted special procedures for handling complex antitrust cases expeditiously, while preserving the rights of the parties. The *Manual for Complex Litigation* has been developed over many years of experience, and any statutory direction concerning the handling of complex antitrust cases should take into account its suggested procedures. No special authority is required to permit the Attorney General to seek an expedited trial date in cases of unusual public importance where preferential treatment is warranted.

Section 702 would also permit the appointment of "special masters, economic experts and other personnel" to assist the trial judge in complex antitrust cases. This provision seems unnecessary in view of the clear existing authority for district judges to use masters and experts in appropriate circumstances.

The appointment of masters is governed by Rule 53 of the Federal Rules of Civil Procedure. We suggest that, at a minimum, any reference to "masters" should be eliminated from this section to avoid any suggestion that Congress intends to modify existing law regarding the use of masters. Presumably, Congress does not intend to overrule the Supreme Court's decision in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), disapproving the reference to masters of antitrust cases on the general issues involved simply because of unusual complexity and the length of trial time required.

Although the matter of court appointed experts is not specifically covered by the Federal Rules of Civil Procedure, there is little question that the courts have inherent power to do so. The *Manual for Complex Litigation* (§ 3.40) warns that great care should be exercised in the use and selection of court-appointed experts. Among the problems and disadvantages emphasized by the experienced federal judges who prepared the Manual are (a) problems of selection and compensation and (b) the undue weight which may be given to the views of such "impartial" experts. It has been argued that selection of the expert may be tantamount to deciding the issues involved.

There is some question whether courts have the power to compensate appointed experts in civil actions, where there is no public fund, comparable to that available in criminal cases, for paying experts. The *Manual for Complex Litigation* concludes that the costs of court-appointed experts are taxable to the parties under the principles of *Ex parte Peterson*, 253 U.S. 300 (1920).

The proposed provisions of this bill do not appear to add to the existing authority of federal courts and do not deal with any of the problems involved in the use of court-appointed experts. We think they should be omitted from the proposed bill.

Section 703

Section 703 would add a new section to the Clayton Act which would permit imposition of sanctions on any party, or person in privity with such party, who failed to comply with court orders to furnish discovery, evidence or testimony on the ground that foreign law prohibited compliance. Sanctions provided include dismissal of claims, striking of defenses or "otherwise terminating the proceeding or any portion thereof adversely as to such party".

This proposed new section seems unnecessary, since it does not provide any power or authority beyond the court's existing power and authority to impose sanctions under Rule 37 of the Federal Rules of Civil Procedure. *Society Internationale v. Rogers,* 357 U.S. 197 (1958). Nor do the proposed provisions of Section 703 provide any guidance as to what factors should be considered by a court in fashioning appropriate orders or sanctions in cases where compliance is prohibited by foreign law. Under existing law it appears that courts may require compliance except where it would result in criminal liability in the foreign country or some catastrophic loss, such as revocation of a license to do business and even in these difficult cases, the courts have broad discretion in dealing with the situation short of entering judgement for or against one of the parties. *United States v. First National City Bank,* 396 F. 2d 897 (2d Cir. 1968); *Society Internationale v. Rogers, supra.*

Since Section 703 does not purport to provide any guidance as to how the courts should deal with the difficult constitutional and international comity issues involved where the discovery is prohibited for foreign law, and does not provide any authority the courts do not already possess, we submit that its adoption would be inappropriate.

[Short recess.]

Senator HART. We will be in order. On the record, let me apologize to Dr. Adams and others who have been inconvenienced by this schedule.

The committee welcomes the distinguished professor, one who has counseled this committee many times before. We welcome his reaction to the legislation that is before us this morning.

Dr. Walter Adams.

STATEMENT OF PROF. WALTER ADAMS, PROFESSOR OF ECONOMICS, MICHIGAN STATE UNIVERSITY

Dr. ADAMS. Members of the committee, it is a pleasure and a privilege to appear before this committee in support of S. 1284, cosponsored by the senior Senator from Michigan, the chairman of this subcommittee, and by the senior Senator from Pennsylvania, the minority leader of the Senate.

The last witness implied that this bill was drafted by "some angry young men." I would not characterize the cosponsors of this bill in that light.

Enactment of this bill, I think, would contribute significantly to effective enforcement of the antitrust laws, and to the promotion of effective competition in the American economy.

In discussing the several provisions of the bill, I propose to comment first on what might be called the "penalty" provisions, and second on what might be called the "information" provisions of the bill.

The last witness, if I may refer to him once again, asked leave to deliver a professorial lecture to the committee. I shall refrain from doing so. I will proceed in my usual, objective, dispassionate, clinical manner.

Senator HART. Always tentative.

Dr. ADAMS. First, title VI, nolo contendere. Under present law, defendants in criminal antitrust cases may, with the court's permission, plead nolo contendere. It is an implied confession of guilt—a polite guilty plea—which does not immunize the defendant from criminal penalties but shields him from a host of other legal unpleasantries.

In effect, the defendant tells the court:

> Your Honor, I do not plead innocent, nor do I plead guilty. I simply refrain from contesting the charges in the criminal indictment. Now, without trial or adjudication of the facts, please proceed to punish me—either by fine or by imprisonment—as if I were, in fact, guilty.

In following this curious procedure, the defendant gains certain palpable benefits without incurring undue risks.

First, he knows that antitrust sentences seldom fit the crime. They are more often than not symbolic slaps on the wrist. Fines are almost never commensurate with the profits derived from the violation; and, hence, are not effective deterrents to rational calculators of the costs and benefits.

Prison sentences are rarely imposed, typically suspended; and, in any event, are usually less than 6 months in duration. Under the antitrust laws, therefore, criminal penalties hardly constitute appropriate punishments; nor do they serve as effective deterrents.

Second, the defendant knows that a nolo contendere plea cannot be used as prima facie evidence by a private plaintiff in subsequent triple damage actions. Though it is an implied confession of guilt upon which criminal penalties can be assessed, the nolo contendere plea is deemed to be equivalent of a consent decree and, in the eyes of the law, treated in the same manner for evidentiary purposes.

By entering such a plea, therefore, the defendant effectively precludes the filing of numerous triple damage actions, because these realistically can be attempted only where the plaintiff is able to rely on the final judgment in prior Government action as prima facie evidence.

In short, the nolo plea has become a protective device which enables the antitrust violator to short circuit the imminent threat of triple damage remedies for the victims of his misfeasance.

Title VI of S. 1284 would deny to antitrust violators the privilege of using nolo contendere as a subterfuge for a guilty plea. In doing so, it would contribute significantly to effective antitrust enforcement, for a number of reasons.

First, by closing the nolo contendere loophole, the bill raises the cost of committing antitrust violations. As Attorney General Brownell put it in his famous Memo No. 42:

> One of the factors which has tended to breed contempt for Federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of nolo contendere.
>
> While it may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending, I can see no justification for it as an everyday practice, particularly where it is used to avoid certain indirect consequences of pleading guilty, such as loss of license or sentencing as a multiple offender.
>
> Uncontrolled use of the plea has led to shockingly low sentences and insignificant fines which are no deterrent to crime.
>
> As a practical matter, it accomplishes little that is useful, even where the Government has civil litigation pending. Moreover, a person permitted to plead nolo contendere admits guilt for the purpose of imposing punishment for his acts and yet, for all other purposes, and as far as the public is concerned, persists in his denial of wrongdoing.

It is no wonder that the public regards consent to such a plea by the Government as an admission that it has only a technical case at most and that the whole proceeding was just a fiasco.

Second, the bill would remove the discriminatory and preferential treatment currently accorded to antitrust violators, and counteracts the all-too-fashionable tendency of regarding antitrust infractions as a relatively harmless species of "victimless, white collar" crime—a mere malum prohibitum, rather than a malum in se.

This bill recognizes, as title I makes clear, that antitrust crimes are not inconsequential. They may be passionless in execution. They may be carried out by nonviolent means. They may be impersonal in character and indifferent in the choice of victims. Their impact may be quite remote from the scene of the crime.

But none of these considerations make criminal offenses under the antitrust laws any less baneful, venal, or antisocial.

Indeed, as E. A. Ross argued long ago, in his landmark work, "Sin and Society":

> Today the villain most in need of curbing is the respectable, exemplary, trusted personage who, strategically placed at the focus of a spider-web of fiduciary relations, is able from his office chair to pick a thousand pockets, poison a thousand sick, pollute a thousand mines, or imperil a thousand lives.
>
> It is the great-scale, high-voltage sinner that needs the shackle. To strike harder at the petty pickpocket than at the [white collar criminal] . . . is to "strain at the gnat and swallow a camel."

Title VI takes a step in the right direction by making nolo contendere equivalent to a guilty plea for evidentiary use in private triple damage actions.

Third, the bill would enable the victims of criminal antitrust violations to seek realistic remedies for the wrongs inflicted on them. As things now stand, the private plaintiff in an antitrust proceeding must shoulder a formidable burden of proof.

He must demonstrate that an antitrust violation has been committed; he must show that he was injured in his business or property as a direct result of such violation; and he must prove the exact amount of the damages sustained by him.

Experience shows that the first step—proof that a violation has occurred—is almost always a costly, time-consuming, and complicated matter.

Moreover, since the typical triple damage plaintiff is a David confronting a Goliath, he generally lacks the resources and competence for the full investigation and analysis on which to base proof of violation.

More often than not, therefore, he is dependent on the Federal Government to have established a violation of the antitrust laws in a prior proceeding, which he can then use as prima facie evidence to carry forward his own claim for damages.

Note, for example, the number of successful triple damage actions based on the convictions obtained by the Government in the great electrical conspiracy.

Note also that the financial impact of these private suits on the conspiring corporations was greater—by a factor of almost 100—than the paltry fines collected by the Government. By making nolo contendere equivalent to a guilty plea, S. 1284 would simply give the victim of criminal antitrust violations a badly needed weapon for his self-defense.

Title III, Federal Trade Commission amendments. This section of S. 1284 would amend the Federal Trade Commission Act to provide for increased penalties for disobeying FTC special orders or subpenas.

In 1914, when establishing the Federal Trade Commission, Congress set the penalty for such infractions at $100 a day. It has not been changed since then. This title would set the penalty at not more than $5,000 nor less than $1,000 per day.

This should not be a controversial question. Clearly, the cost of sinning ought to go up at least as much as the cost of living.

The Wholesale Price Index has increased approximately fivefold between 1914 and 1974.

More important, we must take account of the spectacular increase in the size and earnings of major corporations since the enactment of the old Clayton Act.

Consider, for example, that the Standard Oil Trust in 1911, the year of its dissolution, disbursed dividends of $40 million, whereas one of its successor companies, the Exxon Corp., in 1974, distributed dividends of $1.119 billion—an amount roughly 30 times greater.

Or consider the impact on Exxon of a $100 per day penalty, if the corporation were to violate an FTC order or subpena; on an annual basis, it would amount to $36,500, or one-thousandth of 1 percent of Exxon's profits in 1974.

However inadequate a daily fine of $100 may have been to deter disobedience to FTC orders in 1914, it has with the passage of time become a ludicrous irony.

Enactment of title III would be a simple recognition of that fact.

Title IV, parens patriae. This section of S. 1284 would permit State attorneys general to file antitrust actions and to collect triple damages on behalf of the citizens of their States.

In other words, it would authorize the chief law enforcement officer of the State to file a class action suit on behalf of the victims of antitrust crimes located within his jurisdiction.

Its enactment would increase further the deterrent to the perpetration of one form of white collar crime and offer the victims of such crime an efficacious mechanism for obtaining restitution.

Much of the rationale offered in support of title VI above is equally applicable to title IV, with the additional consideration that States command both more substantial resources and greater expertise than the typical private litigant to bring successful triple damage actions.

Title V, premerger notification. This section of S. 1284 would provide for prior notification to the Federal Trade Commission and the Department of Justice, and a waiting period before a proposed merger can be consummated.

A 60-day waiting period for giant mergers would apply to giant mergers—that is, those with combined assets of $100 million and more.

Further, the section provides that if an antitrust action challenging the legality of the merger is brought during the specified waiting period, the Government is authorized to block consummation of the merger until its legality has been determined by the courts.

The proposed changes, Mr. Chairman, are crucial to effective enforcement of the antimerger provisions of the Celler-Kefavuer Act.

First, the bill would insure that all prospective mergers, and especially giant mergers, would promptly be brought to the attention of the enforcement agencies.

Second, by requiring the submission of certain basic information at the time that notice is given of a proposed merger, and by providing for the submission of additional relevant information upon request by the Federal Trade Commission or the Department of Justice, the bill would insure that the enforcement agencies have the necessary data on the basis of which they can analyze the probable impact of the proposed merger on competition.

Third, the bill would authorize the enforcement agencies to block a merger prior to its consummation and to require that the assets of the merging companies be kept separate until final adjudication of the merger's legality in the courts.

This is a provision of capital importance, because it would avoid the practical difficulties of a postmerger unscrambling of already comingled assets, or of convincing the courts to undertake this onerous task.

The House Judiciary Committee, in its report No. 486, 85th Congress, 1st session, underscored this point:

> The bill will, therefore, help avoid the practical problems of unscrambing corporate mergers entered into in violation of Section 7.
>
> Because of problems involved in an unscrambing process, the courts have been understandably reluctant to order divorcement, divestiture, or dissolution to remedy violations of the antitrust laws.
>
> Indeed, in the more than 60 years of Sherman Act history, courts have entered decrees requiring divorcement, divestiture, or dissolution in only 24 cases, taking the position that judicial restraint should prevent the imposition of divestiture where other effective remedies, less harsh, are available.
>
> It is precisely because of difficulties in restoring the previous status and the attendant reluctance of courts to undo what has been done, that makes necessary the present provisions for evaluating prospective mergers and acquisitions before they have become accomplished facts—before they have developed to the point where it becomes necessary to debate whether a surgical remedy may be too drastic.

The Federal Trade Commission Hearing Examiner, in ruling on the merger between Farm Journal and Country Gentleman, illustrated the difficulty—indeed, the virtual impossibility in some cases—of providing divestiture relief after the merging companies had already commingled their assets and combined their operations.

> It would be difficult, indeed to find an acquisition which would point up the procedural inadequacy and ineffectiveness of Section 7 of the Clayton Act as amended, when its objectives are considered, than that presented here.
>
> It is not just a case of too little and too late, from a trial standpoint. A preacquisition waiting and examination period, made mandatory by statute, coupled with the power to seek injunctive relief from the courts, would have kept the eggs in the basket until it had been determined whether it was to the public's interest to scramble them instead of, as here, trying to unscramble them.
>
> If the record now before this Examiner had been presented for precontract approval, this proceeding would probably have been unnecessary. General equity power, likewise, would accomplish mueh.
>
> Divestiture is only half the objective of the statute, as the Examiner construes it, and its legislative history and purpose.
>
> It does take away, and prevent the further use of competitive tools and weapons illegally acquired, but the aim, it would seem, is broader than that—namely, to restore to the relevant markets those competitive weapons to an active and vigorous use in the hands of the seller, or into those of a new entrant, so that competition may continue with its former vigor.

> This, as repondent contends, is impossible. Country Gentleman is dead, and the "assets" which it turned over to respondent are now without value to any newcomer or, indeed, to any farm publication now in the field.
> When his corn is taken from him and the horse dies, it is the height of vanity to strew the bare corncobs on his grave.
> All that can be accomplished, then, is simple divestiture of the two trade names and the two lists, although, in the Examiner's opinion, this at most may only disturb, but will not diffuse the coalescence which has taken place.

The same point was also made by Prof. Kenneth Elzinga in his landmark article, "The Antimerger Law: Pyrrhic Victories?" A copy of which is attached herewith and which I respectfully submit for inclusion in the record.[1]

Senator HART. It will be printed. What was that "Country Gentleman"?

Dr. ADAMS. That was a farm publication, Senator.

Senator HART. How long ago was that? Can you make a guess?

Dr. ADAMS. I don't know. I don't trust my memory on anything anymore.

Senator HART. We will get it for the record.[2] But the hearing examiner's language sends a very clear message.

Dr. ADAMS. Yes, it does. I would guess it may have been 7 years ago or so, but that is just a rough approximation, Senator.

After carefully reviewing the relief granted in a sample of cases adjudicated under the Celler-Kefauver Act between 1950 and 1964, Elzinga observes—not without a note of sadness—that the relief obtained in the vast majority of merger cases has been far from effective. He concludes:

> First, that the time span between the acquisition and the divestiture order can, in a dynamic market setting, prevent or make very difficult the unscrambling of two firms.
> Second, the so-called partial divestiture has not distinguished itself for efficacy.
> Third, a loose handling of the divestiture of post-acquisition improvements could afford an economic incentive to firms to expand in violation of Section 7, planning on divesting the acquired assets several years hence. The answer to these problems involves cutting down or eliminating this time span.
> It requires a closer adherence to the principle that relief is a failure if sufficient assets are not excommunicated to reestablish an independent firm of sufficient size to survive.
> Normally, this would seem to require full divestiture including any post-acquisition improvements.

Clearly, enactment of title V of S. 1284 would go a long way toward alleviating these problems. It would give the enforcement agencies the necessary authority to interdict effectively those mergers which tend to substantially lessen competition or tend to create a monopoly.

The importance of this objective, I know, need not be underscored before this distinguished committee.

Title II, Antitrust Civil Process Act Amendments. This section of S. 1284 would authorize the Department of Justice to issue civil antitrust process to individuals as well as to corporations and third parties.

Its major importance consists of the fact that the Department could obtain the necessary information to evaluate potential antitrust violations, especially mergers, before, rather than after they have occurred.

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[1] See p. 1035.
[2] Farm Journal, Inc., 53 FTC 26, 1956.

This is not explicitly authorized under present law—a deficiency which should be corrected.

In conclusion, Mr. Chairman, I respectfully submit that the competitive system is not a bellum omnium contra omnes. It is not an ecological equilibrium, a state of nature, in which the law of the jungle reigns supreme.

Rather, it is a legal, ethical, institutional arrangement—an economic community under covenant—an arena where powerful forces collide, but in accordance with strictly prescribed and socially beneficient rules.

In this arena, an individual may seek private gain; his motive may be to benefit neither his neighbor nor his community. But, if the rules of the game are properly drawn, the individual seeking his and only his gain should be able to achieve this goal only by serving others as well.

In this sense, the market is an organizing principle for coordinating individual activity—a planning mechanism which is autonomous, impartial, and external to human control, manipulation, and perversion.

It is a mechanism for harnessing the individual to social ends, while depriving him of power so great that, if abused, it would result in harm to his fellows.

In the "Control of Trusts," published shortly before enactment of the Clayton Act, John Bates Clark emphasized the importance of the rules by which the competitive game is played.

> In our workship of the survival of the fit under free natural selection we are sometimes in danger of forgetting that the conditions of the struggle fix the kind of fitness that shall come out of it; that survival in the prize ring means fitness for pugilism; not for bricklaying nor philanthropy; that survival in predatory competition is likely to mean something else than fitness for good and efficient production; and that only from a strife with the right kind of rules can the right of fitness emerge.
>
> Competition . . . is a game played under rules fixed by the State to the end that, so far as possible, the prize of victory shall be earned, not by trickery or mere self-seeking adroitness, but by value rendered.
>
> It is not the mere play of unrestrained self-interest. It is a method of harnessing the wild beast of self-interest to serve the common good—a thing of ideals and not of sordidness.
>
> It is not a natural state, but like any other form of liberty, it is a social achievement, and eternal vigilance is the price of it.

In short, Mr. Chairman, competition can be effective only if the game is played by the right set of rules. Also, if the rules are to have any meaning, the umpire must be given the powers necessary for their effective enforcement. And that, in essence, is what S. 1284 proposes to help in accomplishing.

Thank you, Mr. Chairman.

Senator HART. I, as always, wonder how—if there has been a voice like yours out there across the country over these years, speaking that eloquently the need of certain obvious things—certain obvious things haven't occurred.

As long as you keep at it, maybe we'll get them. It is a powerful statement. I think you were here this morning when Mr. Nader said the premerger notification figure is too high, at $100 million.

Yesterday, Chairman Engman of the Trade Commission said it was not high enough. Do you have any feeling about that?

Dr. ADAMS. Senator, I really don't. But I think the principle of premerger notification is an important principle to establish because without information you cannot make rational decisions and formulate rational policy. It seems to me that's fundamental.

Senator HART. To put it in a Michigan setting, one of the criticisms against title IV—that's the parens patriae provision—one of the criticisms is that the requirement that members of the class shall be given actual notice is not included there; and in a Supreme Court case, the *Eisen* case, it was held that rule 23 of the Federal rules requires that where you can get the name and address of members of the class, that notice shall be directed to them. The cost of the mailing, postage cost, to the members of that class in *Eisen* would have been $315,000. How many treble damage actions do you think Frank Kelly, our attorney general, would be able to undertake if he had to face up to the business of mailing out in such cases where the class was very broad?

Dr. ADAMS. I would suppose, and I obviously speak as a nonlawyer, that to promote the ends of justice and fairness you would want to serve effective notice on people, rather than impose the burdensome requirement of actual notice—such as the mailing of letters to all the members of a class who can be identified as such.

I think the important principle of the parens patriae provision is the principle of giving victims of an offense against society some means of obtaining a remedy, of obtaining restitution for the wrongs that have been inflicted on them. I think that's the important thing to emphasize.

Senator HART. My comment was that we would hope the Supreme Court would construe the constitutional requirement to have been met by that kind of practical solution to this problem, instead of a first class letter.

Dr. ADAMS. You see, Senator, my basic contention here is that antitrust is not a victimless crime. Just because there is no gore and no violence that is visible in the streets does not mean that antitrust violations do not inflict an injury on individuals, on groups of people, and on society at large.

It is a crime. It is an offense against the public, which does have victims of flesh and blood. They're real, even though it may be difficult to identify them.

Senator HART. Mr. Nash?

Mr. NASH. I just have one question, Mr. Chairman. In 1966, Senator Hart introduced a bill to make a plea of nolo contendere admissible as prima facie evidence in subsequent civil litigation, and you have supported that concept in his latest bill today.

Yesterday, another distinguished professor from Michigan, Mr. Kauper, opposed title VI for a number of reasons. One, he thought it would severely limit the Division's flexibility; two, he thought it would severely strain the Division's resources; and, three, that it would provide very little benefit, in any event, to a treble damage plaintiff.

How do you react to Mr. Kauper's analysis of the nolo contendere title?

Dr. ADAMS. Well, I think it's only fair to point out that Mr. Kauper, yesterday, testified in his capacity as Assistant Attorney General

in charge of the Antitrust Division, rather than in his previous capacity as professor of law at the University of Michigan.

But taking the statement that he made, I disagree. Why does the Department of Justice file any criminal action for antitrust violation?

What does it hope to accomplish? As I see it, the only thing it can accomplish is to deter future violations. And the effectiveness of the deterrent, it seems to me, is a function of the fines that are imposed and the prison sentences that are meted out. Most importantly, I think, in a realistic sense, is the possibility of the victims through treble damage action, imposing an additional financial burden on potential violators.

Now, when you look at the fines that have been assessed in the history of criminal prosecution under the antitrust laws, they are ridiculous.

They are meaningless. They have no impact on most of the large and powerful offenders of the criminal conspiracy provisions of the Sherman Act.

The jail sentences have been practically nonexistent from the beginning of the statute. The Sherman Act was passed in 1890.

The first person to be sent to jail under the Sherman Act was Eugene V. Debbs in the Pullman strike. Since then it was always business racketeers and people in that category, rather than genuine violators of the antitrust laws who've received jail sentences, until 1955 when a district judge in Chicago sentenced three small businessmen, incidentally, to a jail term.

Now we have some jail sentences, infrequently, most of them no longer than 6 months in duration, with time off for good behavior.

I don't know whether anybody under the antitrust laws has ever served more than 3 months in jail. I submit, Mr. Chairman, that's not a deterrent to criminal violation of the antitrust laws.

The only meaningful deterrent that is left is the possibility of treble damage action. In the great electrical conspiracy, what was the total fine that was assessed on all the violators, corporate and private, in this multiple indictment conspiracy?

It was less than $2 million. But the fines—the damages assessed in subsequent treble damage actions, as I point out in my testimony—were approximately 100 times as much.

Now, that, I submit to you, is a more realistic deterrent. So by giving the little David the opportunity, the realistic opportunity of fighting Goliath in the treble damage action, you increase the deterrent to criminal violation of the antitrust laws.

You certainly don't do it by the kinds of fines that the Justice Department is able to get in the successful convictions that it obtains in the courts.

Mr. Chairman, may I suggest that this committee obtain from the Justice Department a list of the penalties, fines and imprisonment from 1890 to the present that have been obtained in criminal prosecutions under the Sherman Act.

Senator HART. A welcome suggestion. Let's try and get it.[1]

Dr. ADAMS. I think this will speak for itself. That's why people like John Kenneth Galbraith point to the antitrust laws and say, "the charade of antitrust," because it just isn't meaningful. When you fine a giant corporation $10,000, $50,000, or even $100,000 for

[1] See pp. 1101 and 1111.

conspiracy that may have lasted for a period of 10 years and has netted the corporation incalculable profits, any rational businessman engaged in cost-benefit calculations is certainly going to look upon the antitrust laws as a paper tiger.

Senator HART. We've all said it before, but it bears repeating. There's a great debate as to the extent that either capital punishment or jail serves as a deterrent to criminals. But, I think commonsense suggests that a very brief jail sentence for a businessman who is engaged in a criminal violation of the antitrust laws—if jail has any deterrent effect—it would have a very substantial deterrent effect in business practices. Because the hoodlum or the poor kid isn't very uncomfortable going to jail, but the fellow out in Grosse Pointe would be appalled at the thought.

Dr. ADAMS. You see, Senator, I think that the analogy with so-called violent crimes is really not apt, because the people who argue in favor of the death penalty say, "Well, if you increase the penalty for committing murder, this will reduce the incidence of murder."

I think the thing that's wrong with that kind of analysis is the assumption that a man about to commit murder makes a rational calculation.

"Now, if I commit murder and if I'm caught, what is my punishment likely to be? Life imprisonment or death?" And then he decides, "Well, since it's only life imprisonment and eventually I can get out, I'll proceed with my little project. But death is too final. Therefore, I will not risk it."

Well, this is madness. Most violent crimes are not rational, premediated acts. But I submit to you that an antitrust violation comes much closer to a rational cost-benefit calculation than the typical violent crime that's committed around the world.

Senator HART. Mr. Chumbris?

Mr. CHUMBRIS. Thank you, Mr. Chairman.

I guess it's been since 1957 or 1958, Dr. Adams, that you've graced these hearings. And you and I have had some very amiable discords over the years thus I hate to bring a little discord in this little colloquy that you had with the chairman, but——

Dr. ADAMS. We don't want to break tradition now, Mr. Chumbris.

Mr. CHUMBRIS. Right. And over the years, I'm going to say that you're getting slimmer and handsomer and tougher and tougher. The chairman read my mind on this one.

[Laughter.]

Mr. CHUMBRIS. You so well went back into some of the hearings on nolo contendere, I'm going to ask the chairman's permission to put in the statement of Judge Bromley [1] that he made beginning on page 41, because he gives the other side of the story. I think that it would be difficult for us to bring him back down. And it's pertaining to this point.

In it he points out that, at that time, the penalty was only $50,000. And that's the reason why you are getting an average of $12,000 and $13,000 fine per case. I believe the nolo and guilty plea cases brought about $12,000 fines and the full trial cases brought about $13,000 average fines.

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[1] See statement of Bruce Bromley, p. 1166.

Today the maximum fine has been increased to $1 million. Also it's now a felony, with 1 to 3 years in jail. I've been advised by Bruce Wilson of the Justice Department last week, when we were discussing these proposed hearings, that recently there's been one case where a 6-month jail sentence and a $263,000 fine was imposed which I imagine is probably one of the largest under the new law recently passed.

And I would assume that with this new law, you will see much higher penalties imposed. They may even reach $1 million. I believe in several of those electric cases in the 1960's the maximum fine was $50,000 and several $50,000 fines were imposed in those cases.

So with Judge Bromley's printed statement going into the record, Mr. Chairman, that would ease my reading any of this particular data. It's almost 2½ pages.

But I wanted to read one paragraph of Judge Bromley, because it does disagree with something you said in your paper.

Maybe you don't want to make it quite so strong after you've read this.

Dr. ADAMS. No. Mr. Chumbris, I've read Judge Bromley's statement and I think Judge Bromley makes about as good a case for the other side as can be made. I think it's a very felicitous suggestion to include Judge Bromley's statement in this record.

Mr. CHUMBRIS. Right. The one point I was going to refer to, and that is on page 43 and the print is so fine I have to read carefully.

"These, then, are some of the reasons why a corporation will not enter a nolo plea and yet stoutly maintain and believe in his innocence," and if you'll recall, he mentioned in his statement the disruption of the staff, of the offices, taking up their time, unfavorable publicity, and the cost of $250,000 or $400,000 in fees, to try lawsuits. These fee costs were testified to when we had those franchise hearings in 1965. Judge Bromley continues as follows:

"To be sure, a nolo plea leads to an entry of a judgment of conviction and in that criminal case, the defendant can be treated exactly as if he had pled guilty.

"But the idea expressed here and elsewhere that such a nolo plea for all purposes is tantamount to an admission of guilt is just not true."

He feels he's innocent, but he'll plea a nolo contendere, although the effect of the nolo contendere would be just as if he were guilty—to avoid a full trial and the costs in money and inconveniences to himself and his staff and company.

It reminds me of the old story of Victor Moore in the skit when he was charged with a $2 fine for a parking ticket and he was innocent. But his lawyer said, "We'll fight it." So he fights it and loses the case, but the lawyer takes it to a higher court but Moore says, "Pay the $2." The lawyer says, "Oh, no, we will win on appeal." So he goes on and appeals and he loses that.

So Victor Moore kept saying, "Pay the $2." And the lawyer says, "Oh, no, we'll go on to the Supreme Court." And after $500,000 in costs and broke, and in a pauper's jail, he finally had to pay the $2.

Well, that's the theory of nolo contendere. You may believe you're innocent, but it may cost your life to prove it, and every dollar you have in your pocket.

That's why the nolo theory is still a good theory and why it should apply, as Mr. Kauper indicated, because the Justice Department

believes it is better for the administration of justice, aside from the reasons given for what it does for the small businessman-defendant.

Dr. Adams. I would suggest two considerations in response, if I may. One, I note that the nolo plea is only available for certain classes of white-collar crime.

It is not available for arson, murder, or rape. When an individual very often would like to plead nolo, even though he thinks he's innocent, and yet he doesn't have the opportunity to do so.

I think this is still a privilege that is available only to the white-collar criminal in our society.

Second, if I may remind you, in the great electrical conspiracy, when the indictments were handed down, the companies reacted immediately and vociferously, proclaiming their innocence.

Then they went into court and asked to change their plea to nolo contendere. The Justice Department opposed those nolo pleas. And, in that case, the court upheld Justice and refused to accept the nolo plea. Then what did the defendants do?

They pleaded guilty, and I think the availability of the nolo plea is just a cop-out, it seems to me, in the maintenance and the promotion, the execution of justice.

Mr. Chumbris. On the last point you made, if my memory serves me correctly, not all of the defendants in those electric cases pleaded guilty. Some of them still maintained the nolo contendere and the court accepted them even though the Justice Department objected.

In other cases the court went along with the Justice Department and in some of them the cases went to trial.

Dr. Adams. Right, but you see, there were enough guilty pleas entered there to make the subsequent treble damage actions possible and effective, and that's my only point.

A nolo plea is really the shabbiest form of plea bargaining. Suppose—as the Justice Department claims—the nolo contendere option gives it flexibility in enforcing the antitrust laws, OK? So they exact a nolo plea out of the defendant in the criminal suit, which means the court can then pronounce sentence—either fine or imprisonment.

I submit to you that the public interest has not gained very much because of the inadequacy of the fine and the rarity of the prison sentence.

Remember that in a criminal suit you punish only for past offenses; and it's that punishment which is held out presumably as a deterrent to future violations.

But if the cost of consuming delinquency is too low, you're going to get a lot of delinquents.

Mr. Chumbris. But that has been changed by this new law.

Dr. Adams. Well, we will see. You know, for the longest time—indeed, since 1890—the maximum jail sentence that was in the law was 1 year, and that was never used to the fullest.

Indeed, as I pointed out, the jail sentence was not used at all for genuine antitrust violations until 1955—which was 65 years after the act was first passed.

So I'm not holding my breath about 3-year jail sentences being imposed by the courts for a flagrant violation of the antiprice fixing provisions of the Sherman Act, for example.

Mr. Chumbris. Thank you, Dr. Adams, and thank you, Mr. Chairman.

Senator HART. I asked the staff to select from a publication of the National Economic Research Associates, "Tougher Antitrust Policy," [1] several tables that bear on the number of days, how much in fines.

It is very interesting. I think the record will benefit from this kind of thing.

Professor, thank you very much.

Dr. ADAMS. Thank you.

[The prepared statement of Dr. Adams follows. Testimony resumes on p. 217.]

PREPARED STATEMENT OF DR. WALTER ADAMS, PROFESSOR OF ECONOMICS, AND PAST PRESIDENT, MICHIGAN STATE UNIVERSITY

It is a pleasure and a privilege to appear before this Committee in support of S. 1284, co-sponsored by the senior Senator from Michigan, the Chairman of this Subcommittee, and by the senior Senator from Pennsylvania, the Minority Leader of the Senate. Enactment of this bill would contribute significantly to effective enforcement of the antitrust laws, and to the promotion of effective competition in the American economy.

In discussing the several provisions of the bill, I propose to comment first on what might be called the "penalty" provisions, and second on what might be called the "information" provisions of the bill.

TITLE VI—NOLO CONTENDERE

Under present law, defendants in criminal antitrust cases may, with the court's permission, plead nolo contendere. It is an implied confession guilt—a polite guilty plea—which does not immunize the defendant from criminal penalties but shields him from a host of other legal unpleasantries. In effect, the defendant tells the court: "Your Honor, I do not plead innocent. Nor do I plead guilty. I simply refrain from contesting the charges in the criminal indictment. Now, without trial or adjudication of the facts, please proceed to punish me—either by fine or by imprisonment—as if I were in fact guilty."

In following this curious procedure, the defendant gains certain palpable benefits with incurring undue risks. First, he knows that antitrust sentences seldom fit the crime. They are more often than not symbolic slaps on the wrist. Fines are almost never commensurate with the profits derived from the violation, and hence are not effective deterrents to rational calculators of the costs and benefits. Prison sentences are rarely imposed, typically suspended, and in any event are usually less than 6 months in duration. Under the antitrust laws, therefore, criminal penalties hardly constitute appropriate punishments; nor do they serve as effective deterrents. Second, the defendant knows that a nolo contendere plea cannot be used as prima facie evidence by a private plaintiff in subsequent triple damage actions. Though it is an implied confession of guilt upon which criminal penalties can be assessed, the nolo contendere plea is deemed to be equivalent of a consent decree and, in the eyes of the law, treated in the same manner for evidentiary purposes. By entering such a plea, therefore, the defendant effectively precludes the filing of numerous triple damage actions, because these can realistically be attempted only where the plaintiff is able to rely on a final judgment in prior government action as prima facie evidence. In short, the nolo plea becomes a protective device which enables the antitrust violator to short-circuit the imminent threat of triple damage remedies for the victims of his misfeasance.

Title VI of S. 1284 would deny to antitrust violators the privilege of using nolo contendere as a subterfuge for a guilty plea. In doing so, it would contribute significantly to effective antitrust enforcement—for a number of reasons.

First, by closing the nolo contendere loophole, the bill raises the cost of committing antitrust violations. As Attorney General Brownell put it in his famous Memo No. 42,

"One of the factor which has tended to breed contempt for federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of nolo contendere. While it may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending, I can see no justification for it as an everyday practice, particularly where it is used to avoid certain indirect consequences of pleading guilty, such as loss of license or sentencing as a multiple offender.

[1] See p. 1084.

Uncontrolled use of the plea has led to shockingly low sentences and insignificant fines which are no deterrent to crime. As a practical matter it accomplishes little that is useful even where the Government has civil litigation pending. Moreover, a person permitted to plead nolo contendere admits guilt for the purpose of imposing punishment for his acts and yet, for all other purposes, and as far as the public is concerned, persists in his denial of wrongdoing. It is no wonder that the public regards consent to such a plea by the Government as an admission that it has only a technical case at most and that the whole proceeding was just a fiasco."

Second, the bill would remove the discriminatory and preferential treatment currently accorded to antitrust violators, and counteract the all-too-fashionable tendency of regarding antitrust infractions as a relatively harmless species of "victimless," "white collar" crime—a mere *malum prohibitum* rather than a *malum in se.* The bill recognizes, as Title I makes clear, that antitrust crimes are not inconsequential. They must be passionless in execution. They may be carried out by non-violent means. They may be impersonal in character and indifferent in the choice of victims. Their impact may be quite remote from the scene of the crime. But none of these considerations make criminal offenses under the antitrust laws any less baneful, venal, or anti-social. Indeed, as E. A. Ross argued long ago, in his landmark work "Sin and Society,"

"Today the villain most in need of curbing is the respectable, exemplary, trusted personage who, strategically placed at the focus of a spider-web of fiduciary relations, is able from his office-chair to pick a thousand pockets, poison a thousand sick, pollute a thousand minds, or imperil a thousand lives. It is the great-scale, high-voltage sinner that needs the shackle. To strike harder at the petty pick-pocket than at the [white collar criminal] * * * is to 'strain at a gnat and swallow a camel.' "

Title VI takes a step in the right direction by making nolo contendere equivalent to a guilty plea for evidentiary use in private triple damage actions.

Third, the bill would enable the victims of criminal antitrust violations to seek realistic remedies for the wrongs inflicted on them. As things now stand, the private plaintiff in an antitrust proceeding must shoulder a formidable burden of proof. He must demonstrate that an antitrust violation has been committed; he must show that he was injured in his business or property as a direct result of such violation; and he must prove the exact amount of the damages by him sustained. Experience shows that the first step—proof that a violation has occurred—is almost always a costly, time-consuming, and complicated matter. Moreover, since the typical triple damage plaintiff is a David confronting a Goliath, he generally lacks the resources and competence for the full investigation and analysis on which to base proof of violation. More often than not, therefore, he is dependent on the federal government to have established a violation of the antitrust in a prior proceeding which he can then use as prima facie evidence to carry forward his own claim for damages. (Note, for example, the number of successful triple damage actions based on the convictions obtained by the government in the great electrical conspiracy. Note also that the financial impact of these private suits on the conspiring corporations was greater—by a factor of approximately 100—than the paltry fines collected by the government.) By making nolo contendere equivalent to a guilty plea, S. 1284 would simply give the victim of criminal antitrust violations a badly needed weapon for his self-defense.

TITLE III—FEDERAL TRADE COMMISSION AMENDMENTS

This section of S. 1284 would amend the Federal Trade Commission Act to provide for increase penalties for disobeying FTC special orders or subpoenas. In 1914, when establishing the Federal Trade Commission, Congress set the penalty for such infractions at $100 a day. It has not been changed since then. This title would set the penalty at not more than $5,000 nor less than $1,000 per day.

This should not be a controversial question. Clearly, the cost of sinning ought to go up at least as much as the cost of living. (The wholesale price index has increased approximately fivefold between 1914 and 1974.) More important, we must take account of the spectacular increase in the size and earnings of major corporations since the enactment of the old Clayton Act. Consider, for example, that the Standard Oil Trust in 1911, the year of its dissolution, disbursed dividends of $40,000,000, whereas one of its successor companies, the Exxon Corporation, in 1974, distributed dividends of $1,119,000,000—an amount roughly 30 times greater. Or consider the impact on Exxon of a $100 per day penalty, if the corporation were to violate an FTC order or subpoena; on an annual basis, it

would amount to $36,500—or one-thousandth of one percent of Exxon's profits in 1974.

However inadequate a daily fine of $100 may have been to deter disobedience to FTC orders in 1914, it has with the passage of time become a ludicrous irony. Enactment of Title III would be a simple recognition of that fact.

TITLE IV—PARENS PATRIAE

This section of S. 1284 would permit State attorneys general to file antitrust actions and to collect triple damages on behalf of the citizens of their states. In other words, it would authorize the chief law enforcement officer of a State to file a "class action" suit on behalf of the victims of antitrust crimes located within his jurisdiction. Its enactment would increase further the deterrent to the perpetration of one form of "white collar" crime and ofier the victims of such crimes an efficacious mechanism for obtaining restitution. Much of the rationale offered in support of Title VI above is equally applicable to Title IV, with the additional consideration that States command both more substantial resources and greater expertise than the typical private litigant to bring successbul triple damage actions.

TITLE V—PREMERGER NOTIFICATION

This section of S. 1284 would provide for prior notification to the Federal Trade Commission and the Department of Justice, and a waiting period before a proposed merger can be consummated. A 30-day waiting period would apply to all corporate mergers, and a 60-day waiting period to giant mergers—i.e. those with combined assets of $100 million and more. Further, the section provides that if an antitrust action challenging the legality of the merger is brought during the specified waiting period, the Government is authorized to block consummation of the merger until its legality has been determined by the courts.

The proposed changes are crucial to effective enforcement of the antimerger provisions of the Celler-Kefauver Act. First, the bill would insure that all prospective mergers, and especially giant mergers, would promptly be brought to the attention of the enforcement agencies.

Second, by requiring the submission of certain basic information at the time that notice is given of a proposed merger, and by providing for the submission of additional relevant information upon request by the Federal Trade Commission or the Department of Justice, the bill would insure that the enforcement agencies have the necessary data on the basis of which they can analyze the probable impact of the proposed merger on competition.

Third, the bill would authorize the enforcement agencies to block a merger prior to its consummation and to require that the assets of the merging companies be kept separate until final adjudication of the merger's legality in the courts. This is a provision of capital importance, because it would avoid the practical difficulties of a postmerger unscrambling of already commingled assets, or of convincing the courts to undertake this onerous task. The House Judiciary Committee, in its Report No. 486, 85th Congress, 1st session, underscored this point:

"The bil' will, therefore, help avoid the practical problems of unscrambling corporate mergers entered into in violation of section 7. Because of problems involved in an unscrambling process, the courts have been understandably reluctant to order divorcement, divestiture, or dissolution to remedy violations of the antitrust laws. Indeed, in the more than 60 years of Sherman Act history, courts have entered decrees requiring divorcement, divestiture or dissolution in only 24 cases, taking the position that judicial restraint should prevent the imposition of divestiture where other effective remedies, less harsh, are available. It is precisely because of difficulties in restoring the previous status and the attendant reluctance of courts to undo what has been done, that makes necessary the present provisions for evaluating prospective mergers and acquisitions before they have become accomplished facts—before they have developed to the point where it becomes necessary to debate whether a surgical remedy may be too drastic."

The Federal Trade Commission Hearing Examiner, in ruling on the merger between Farm Journal and Country Gentleman, illustrated the difficulty—indeed, the virtual impossibility in some cases—of providing divestiture relief after the merging companies had already commingled their assets and combined their operations (*In the Matter of Farm Journal*, Docket 6388):

"It would be difficult, indeed, to find an acquisition which would point up the procedural inadequacy and ineffectiveness of section 7 of the Clayton Act as amended, when its objectives are considered, than that presented here. It is not

just a case of too little and too late, from a trial standpoint. A preacquisition waiting and examination period, made mandatory by statute, coupled with the power to seek injunctive relief from the courts, would have kept the eggs in the basket until it had been determined whether it was to the public's interest to scramble them, instead of, as here, trying to unscramble them. If the record now before this examiner had been presented for precontract approval, this proceeding would probably have been unnecessary. General equity power likewise would accomplish much.

"Divestiture is only half the objective of the statute, as the examiner construes it, and its legislative history and purpose. It does take away, and prevent the further use of competitive tools and weapons illegally acquired, but the aim, it would seem, is broader than that—namely, to restore to the relevant markets those competitive weapons to an active and vigorous use in the hands of the seller, or into those of a new entrant, so that competition may continue with its former vigor. This, as respondent contends, is impossible. Country Gentleman is dead, and the 'assets' which it turned over to respondent are now without value to any newcomer or, indeed, to any farm publications now in the field. When his corn is taken from him and the horse dies, it is the height of vanity to strew the bare corncobs on his grave. All that can be accomplished, then, is simple divestiture of the 2 trade names and the 2 lists, although, in the examiner's opinion, this at most may only disturb, but will not diffuse the coalescence which has taken place."

The same point was also made by Professor Kenneth Elzinga in his landmark article, "The Antimerger Law: Pyrrhic Victories?," a copy of which is attached herewith as an appendix to my statement and which I respectfully submit for inclusion in the record. After carefully reviewing the relief granted in a sample of cases adjudicated under the Celler-Kefauver Act between 1950 and 1964, Elzinga observes—not without a note of sadness—that the relief obtained in the vast majority of merger cases has been far from effective. He concludes

"First, that the time span between the acquisition and the divestiture order can, in a dynamic market setting, prevent or make very difficult the unscrambling of two firms. Second, the so-called partial divestiture has not distinguished itself for efficacy. Third, a loose handling of the divestiture of post-acquisition improvements could afford an economic incentive to firms to expand in violation of Section 7, planning on divesting the acquired assets several years hence. The answer to these problems involves cutting down or eliminating this time span. It * * * requires a closer adherence to the principle that relief is a failure if sufficient assets are not excommunicated to reestablish an independent firm of sufficient size to survive. Normally, this would seem to require full divestiture including any post-acquisition improvements."

Clearly, enactment of Title V of S. 1284 would go a long way toward alleviating these problems. It would give the enforcement agencies the necessary authority to interdict effectively those mergers which tend to substantially lessen competition or tend to create a monopoly. The importance of this objective, I know, need not be underscored before this distinguished Committee.

TITLE II—ANTITRUST CIVIL PROCESS ACT AMENDMENTS

This section of S. 1284 would authorize the Department of Justice to issue civil antitrust process to individuals as well as to corporations and third parties. Its major importance consists of the fact that the Department could obtain the necessary information to evaluate potential antitrust violations (especially mergers) before rather than after they have occurred. This is not explicitly authorized under present law—a deficiency which should be corrected.

CONCLUSION

In conclusion, I respectfully submit that the competitive system is not *bellum omnium contra omnes*. It is not an ecological equilibrium, a state of nature, in which the law of the jungle reigns supreme. Rather, it is a legal, ethical, institutional arrangement—an economic community under covenant—an arena where powerful forces collide, but in accordance with strictly prescribed and socially beneficient rules. In this arena, an individual may seek private gain; his motive may be to benefit neither his neighbor nor his community, but if the rules of the game are properly drawn, the individual seeking his and only his gain should be able to achieve this goal only by serving others as well. In this sense, the market is an organizing principle for coordinating individual activity—a planning mechanism which is autonomous, impartial, and external to human control, manipulation,

and perversion. It is a mechanism for harnessing the individual to social ends, while depriving him of power so great that, if abused, it would result in harm to his fellows.

In "The Control of Trusts," published shortly before enactment of the Clayton Act, John Bates Clark emphasized the importance of the rules by which the competitive game is played:

"In our worship of the survival of the fit under free natural selection we are sometimes in danger of forgetting that the conditions of the struggle fix the kind of fitness that shall come out of it; that survival in the prize ring means fitness for pugilism; not for bricklaying nor philanthrophy; that survival in predatory competition is likely to mean something else than fitness for good and efficient production; and that only from a strife with the right kind of rules can the right kind of fitness emerge. Competition * * * is a game played under rules fixed by the state to the end that, so far as possible, the prize of victory shall be earned, not by trickery or mere self-seeking adroitness, but by value rendered. It is not the mere play of unrestrained self-interest; it is a method of harnessing the wild beast of self-interest to serve the common good—a thing of ideals and not of sordidness. It is not a natural state, but like any other form of liberty, it is a social achievement, and eternal vigilance is the price of it."

In short, competition can be effective only if the game is played by the right set of rules. Also, if the rules are to have any meaning, the umpire must be given the powers necessary for their effective enforcement. And that, in essence, is what S. 1284 proposes to do.

Senator HART. Our next and concluding witness, and let me renew my apology for the long delay, is Mr. Richard Godown, the general counsel for the National Association of Manufacturers.

STATEMENT OF RICHARD D. GODOWN, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. GODOWN. Good morning, Mr. Chairman.

I am accompanied today at the witness table by an assistant general counsel from NAM, Mr. John Finch.

May I begin by saying that I was having so much fun listening to Professor Adams that I almost wish that we could engage ourselves in a debate. While I note his presence still in the room, I would like to just make one or two brief comments.

He was questioning the efficacy of the death penalty as a deterrent for murderers, and it seems to me there is an easy answer to that. It may not deter other murderers, but certainly deters the murderer who gets the death penalty.

Senator HART. That raises the second problem for those of us who are opposed to capital punishment. That assumes you get the right guy before you execute him.

Mr. GODOWN. Indeed it does.

Professor Adams also seemed to be taking a great issue with the fact that there aren't more businessmen in jail because of violations of the Antitrust Act.

I myself wonder why—and I make no reference to Professor Adams at this point, because I don't know the gentleman—there aren't more stringent laws, for instance, to protect misstatements and misguiding of students in our colleges and universities when the people lecture against, or are inimical to, the best interests of the free enterprise system.

I think that is a growing cancer in our society which should be rooted out.

Senator HART. Well, I see clearly that you two should meet afterward and exchange your views.

Mr. GODOWN. I will stop now, except to say that the professor also characterized his testimony as being clinical. If I may, I would like to characterize my forthcoming testimony as being honest and forthright.

Mr. GODOWN. I will summarize my remarks, Mr. Chairman and may I ask that the full text be printed for the record.[1]

Senator HART. It will be printed as though given.

Mr. GODOWN. Thank you very much.

I am Richard D. Godown. I am senior vice president and general counsel of the National Association of Manufacturers, and we thank you for this invitation to appear and give testimony on S. 1284, the omnibus antitrust bill.

Careful review of its provisions on our part leads us to the conclusion that we cannot support S. 1284, and our reasons are spelled out in the discussion of each title.

I would like to emphasize that NAM strongly favors equitable laws against monopoly and restraint of trade under fair and effective enforcement.

On the other hand, it is our position that individuals and business enterprises should be free—to the greatest extent practicable consistent with law enforcement—from the harassment involved and expense arising from ill-founded actions or proceedings brought under the antitrust laws or the Federal Trade Commission Act.

I go now to a discussion of title II, the Antitrust Civil Process Act Amendments. The Antitrust Civil Process Act, herein referred to as the ACPA, provides that whenever the Attorney General has reason to believe that any person other than a natural person under investigation may have documentary material relevant to a present or a past antitrust violation, he may require its production by issuance and service of a civil investigative demand, a CID.

During the floor debates on S. 167 in the 87th Congress, Representative McCulloch, a member of the House subcommittee which considered the bill, said:

> The fact that the Attorney General is the chief prosecuting officer of the Federal Government and the fact that an untrammeled right to obtain information could severely harm the rights of the individual have lead the Committee on the Judiciary to strictly circumscribe the extent to which the civil process may be used.

A list of the way in which the Congress strictly circumscribed the extent to which CID's may be used was presented during the House debates. Some of them follow:

A CID is restricted to situations where a concern is or has been engaged in an antitrust violation, not in some activity which may develop into a violation in the future.

A civil demand is limited to the receipt of documentary evidence, not to the taking of oral testimony. It cannot be used to obtain personal documents of a natural person.

The Attorney General is prohibited from turning over to any other department or Government agency documents received under a CID.

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[1] Prepared statement appears on p. 228.

Now, the proposed title II of S. 1284 would destroy each of these safeguards specifically provided for in the ACPA by the 87th Congress to protect the rights of the individual, and to ward off possible abuses of investigative power.

It would extend the scope of the permitted inquiry to activities which may lead to an antitrust violation, to oral and written interrogatories which would be authorized. Third parties, including natural persons, could be swept into the net of investigation, and evidence obtained could be used in other cases or regulatory proceedings.

It is NAM's view that each of the amendments proposed in title II of S. 1284 should be rejected in order to uphold the high standards and great concern expressed in the 87th Congress for the rights of the individual.

We object to CID's being served upon persons, including natural persons, not under investigation or even suspected of an antitrust violation.

This particular issue of whether to expand the CID to persons not under investigation was dealt with specifically by the 87th Congress. Positions in favor of limiting coverage to corporations, firms or associations under investigation were taken by the American Bar Association and the Attorney General's National Committee To Study the Antitrust Laws—and we agree with those positions.

We are further opposed to amending the ACPA to include, within the scope of inquiry, any activity which may lead to an antitrust violation. We feel that this would promote unlimited fishing expeditions.

The issue of whether to include prospective violations within the realm of investigation was rejected after opposition was received from the American Bar Association, as well as the Attorney General's National Committee To Study the Antitrust Laws. This was during consideration in the 87th Congress.

The Attorney General's National Committee To Study the Antitrust Laws produced a committee report which stated:

> We believe that the use of criminal processes other than for investigation with an eye toward indictment and prosecution subverts the department's policy of proceeding criminally only against flagrant offenses and debases the law by tarring respectable citizens with the brush of crime when their deeds involve no criminality.

NAM concurs.

We are quite concerned over the possibility of harassment of innocent persons.

The report of the Attorney General's Committee To Study the Antitrust Laws also voiced disapproval of any subpena power that would permit prosecuting officers in antitrust investigations to summon oral testimony by placing businessmen under oath.

The committee believed that such authority is readily susceptible to grave abuse and is unnecessary. NAM concurs.

Now, to the question of whether the Justice Department should or should not be allowed to pass on documents acquired under the CID procedure to other Government agencies.

During the Senate debates in 1962, Senator Ervin expressed the opinion that if the Attorney General obtains data for one purpose, he should pursue that purpose and should not undertake to transfer the information he obtains either to the legislative branch or to any other

administrative agency—without at least giving the injured person a chance to go into court and protect his rights.

We believe this proposal in the bill is totally unnecessary inasmuch as other agencies have their own procedures for investigation. But more importantly, material acquired by the CID for one purpose could then be used for other purposes totally unrelated to the reasons which induced the original demand without any regard for the rights of the persons subpenaed by the CID.

In short, under title II of the proposed S. 1284 many of the safeguards specifically selected by the Congress in its enactment of the ACPA would be destroyed. Important individual rights would be abandoned.

In an expressed desire to protect the individual, the 87th Congress specifically chose to limit the ACPA to past or present antitrust violations—the production of documents only, subpenaing corporations, organizations, and entites, but not natural persons, and allowing the subpenaed information to be used only by the Justice Department.

We agree with that position and believe that that's the way the law should read. I pass now, to a discussion of title III and amendments to the Federal Trade Commission Act.

Title III of S. 1284 contains only two substantive provisions. Section 301(a) would increase the penalties for failure to comply with FTC subpenas and report orders.

Section 301(b) is said to merely codify existing case law relating to the enjoining of such subpenas and orders.

The proposed increase in penalties is from the present level of $100 a day to a minimum of $1,000 a day and a maximum of $5,000 a day. These are civil penalties.

Section 301(a) would additionally extend the applicability of such civil penalties to failure to comply with FTC subpenas, for which present law provides only criminal penalties.

We believe the ten- to fifty-fold increase in civil penalties is unwarranted. There will always be situations where a respondent has what, in good faith, is believed to be valid reasons for legally contesting such process.

By drastically increasing the penalties which might be imposed if such a contest fails, section 301(a) would have an unfortunate chilling effect on the assertion of legal rights by respondents.

The proposed increase in civil penalties is of such large magnitude that it would predictably deter the raising of legitimate, but judicially uncertain challenges. Therefore, such increase, in NAM's view, is not sound legislative policy.

For the same reason, we oppose extension of the civil penalties to cover subpenas. The availability of criminal sanctions, as now provided under present law, is sufficient deterrent against frivolous or unreasonable refusals to comply with FTC subpenas.

I go now to a discussion of title IV, which deals with parens patriae. Where antitrust violations are alleged to exist, S. 1284 would empower the attorney general of a State to bring an action in Federal district court in the name of the State as parens patriae of the citizens of that State for damages they personally sustained or as a class action.

Similarly, any State attorney general could institute a parens patriae suit for damages to the general economy of the State, or its

political subdivisions, or could bring suit on behalf of any or all political subdivisions of that State for damages each had sustained.

S. 1284 would permit recovery of aggregate damages—without separate proof of individual claims—and proof of damages could be accomplished through statistical sampling methods, or pro rate allocation of "illegal overcharges" or "excess profits" or through any other method of estimating aggregate damages which the court found reasonable and would permit.

S. 1284 also provides that if a State attorney general fails to act, the U.S. Attorney General is thereafter deemed parens patriae of the citizens of that State and may bring suit on their behalf.

Finally, where a federally funded State program is affected by antitrust violations, a State is entitled to treble damages for overcharges or other damages.

Now, it is obvious that this legislation is intended to overcome the Supreme Court decision in *Hawaii* v. *Standard Oil*, wherein the court held that a State may not sue for damages to the general economy under section 4 of the Clayton Act. Because proof of such injury even if established, does not qualify as injury to a State's business or property as required under the statute.

Moreover, in the case of *California* v. *Frito-Lay*, the Ninth Circuit Court of Appeals held that California could not maintain a parens patriae action to recover damages for its citizens as a result of alleged antitrust violations—because such suits were not justified on the basis of the historical role of States in such actions.

We believe that section 4 of the Clayton Act, with its provisions for private actions and treble damages, constitutes a strong deterrent.

The possibility of multiple private attorneys general bringing suit is a sobering thought, causing corporation counsel to advise caution and restraint when new activities are considered in areas where the law is uncertain.

We believe that the manifest difficulty involved in any rational attempt to measure and apportion antitrust damages to the general economy of a State, or its political subdivisions, provides strong argument for deletion of this provision from the bill.

Let me now discuss the aggregate damages provision. Under section 401 of S. 1284, the State "may recover the aggregate damages sustained by the persons or political subdivisions on whose behalf the State sues without separately proving the individual claims of each such person or political subdivision."

A litigant suing for treble damages under section 4 can recover only if he is first able to establish a violation which, in fact, proximately injured him in an amount measurable in dollars and not subject to speculation.

Thus, although section 401 would seem to acknowledge the necessity for establishing the amount of damages, neverthless, it remains silent on the question of proof that the individual citizen has in fact been damaged.

We believe that reliance should be placed upon the newly enacted Antitrust Procedures and Penalties Act—which significantly increased both the corporate and individual fines for antitrust violations as well as extending the possible jail term to 3 years—rather than introduce the novel concepts of section 401 into the law.

There can be little doubt that its enactment would lay open the way for damage awards out of all proportion to any injury sustained.

We note for the record, and with some pleasure, that the kind of troublesome provisions which would permit duplicative recovery—and also which would mandate that the U.S. Attorney General bring suit if the State attorney general did not—are missing from this bill.

These facts notwithstanding, we nevertheless feel called upon to record our strong objections to title IV of S. 1284. We do not feel that alteration of antitrust law in the manner suggested would abolish inequities; rather, we feel, it would create them.

Now, to title V and premerger notification. NAM totally opposes title V and submits that it is unnecessary for the accomplishment of legitimate antitrust law enforcement.

Although "premerger notification" is the caption of title V, we view prevention of mergers as its intention. And although prevention of illegal mergers is the avowed purpose of title V, the provisions of title V allow prevention of any merger, without adequate legal safeguards, in our opinion.

Basically, our argument is that title V is unnecessary. Premerger notification legislative proposals of the 1950's have already been substantially achieved, and no legislation is needed at this time.

We believe that title V grants unwarranted arbitrary power to Government officials. The proposed section 23(b)(3) expands the scope of premerger notification from large companies, by any definition, to "any person or persons engaged in commerce, or in any activities affecting commerce."

In addition, it directs the FTC to require filing of premerger notification reports with the FTC by such newly covered persons at least 30 days prior to the effective date of an acquisition.

NAM vigorously opposes extending premerger notification requirements to virtually all U.S. companies. Such an extension would cover literally thousands of transactions with no legally significant anticompetitive effect and impose unjustified and pointless burdens on small- and medium-sized companies.

Although proposed section 23(b)(4) allows the Trade Commission to "except classes of persons and transactions from the notification requirements," NAM opposes such unlimited delegation of power to the Federal Trade Commission.

Proposed section 23(c)(1) empowers the FTC and the Antitrust Division to "require submission of additional information and documentary material relating to the acquisition."

The FTC would do so pursuant to the Federal Trade Commission Act, and the Antitrust Division pursuant to the Antitrust Civil Process Act.

Failure to produce the additional information in full, within the time specified, subjects the acquisition to postponement by either the FTC or the Antitrust Division.

We specifically object to the extension of the ACPA to natural persons, to obtaining of other than documentary material, and to involvement of persons not under investigation.

Proposed section 23(b)(1) establishes a statutory notification and waiting period of 60 days for large corporations. In this context, a large corporation is one with total assets or annual net sales in excess of $100 million. The statutory period begins to run from the day on

which the premerger notification is filed with the FTC and the Antitrust Division.

Proposed section 23(a) explicitly prohibits acquisition by covered large companies until the expiration of the statutory waiting period. There is no comparable waiting period or explicit prohibition of acquisitions for smaller companies covered by the proposed section 23(b)(1).

We oppose any mandatory waiting period. Business realities may require completing a transaction in fewer than 60 days, as the FTC has acknowledged under its current premerger notification program. Under "exceptional circumstances," the FTC states that "where the time schedule of such merger or acquisition does not permit timely filing, the special report should be submitted as promptly as possible.

We feel the proposed section 23(b)(1) is too rigid and unrealistic.

Inflexible waiting periods are not the worst defects in title V. Proposed section 23(c)(2) allows indefinite extension of the statutory waiting periods, without adequate legal safeguards.

Proposed section 23(c)(1), as we have already noted, allows the FTC and the Antitrust Division to demand additional information "prior to the expiration of the periods specified in subsections (b)(1) and (b)(3)"; namely, 60 and 30 days, respectively.

Proposed section 23(c)(2) would empower the FTC or the Antitrust Division to "extend the periods specified in Subsections (b)(1) and (b)(3)," in their discretion, if the demanded additional information "is not produced in full within the time specified."

The acquisition would be postponed "for an additional period of up to 30 days beyond the date" on which the Government agency notifies the party from whom additional information is demanded that it is satisfied.

Finally, the proposed section 23(c)(2) appears to limit relief to suits for a declaratory judgment instituted in the U.S. District Court for the District of Columbia.

We strongly oppose proposed section 23(c)(2) because of its inherent potential for arbitrary and unjust action.

The proposed section appears to allow only the remaining time within the 30- or 60-day periods for responses to the demand for additional information.

If the Government may "extend the periods" because the demanded information "is not produced in full within the time specified," then it seems to us that the extension must be made prior to the expiration of the original 30- or 60-day notification periods.

This might require a company to produce voluminous information within a period of days in order to avoid postponement of a merger.

Once the notification periods are extended, they would appear to become open ended. This provides an incentive to demand additional information in order to avoid having to make any decision on the merits within the original statutory period.

Such an escape will appear overwhelmingly inviting to Government officials who cannot analyze all the data needed for an objective determination within a 30- or 60-day period; and who do not want to be criticized for implicitly allowing an acquisition which is later subject to litigation.

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Since demands for additional information can be made on a great number of persons, the parties to the acquisition may have no control over the submission of the demanded information within the deadline. Thus, they would be subjected to delay that might prejudice the acquisition through no fault of their own. This, we feel, is most decidedly unfair.

Proposed section 23(c)(2) would limit the judicial review of extended and open-ended waiting periods to actions brought by persons from whom additional information is demanded and from whom notification of satisfaction is "unreasonably withheld" by Government officials.

Thus, the parties to the acquisition would be precluded from seeking declaratory relief if the demand of additional information that triggered the extension was made on a person not related to the acquisition. And this, too, we feel is unjust.

Judicial review would be limited to civil actions for declaratory relief instituted in the U.S. District Court for the District of Columbia.

But, we ask, why is injunctive relief implicitly denied aggrieved parties? Why must plaintiffs file suit in the District of Columbia rather than the district in which they reside or do business?

Since the public interest clearly requires prevention of illegal mergers, it seems safe to assume that a certification that the public interest requires relief pendente lite will be filed in every proceeding or action falling under the proposed section 23(d).

Not to file such a certification could be viewed as an acknowledgment that the allegation of illegality is weak or questionable.

Yet proposed section 23(d) appears to require the court to enter an order postponing the acquisition automatically, without discretion, whenever a certification is made.

We wonder why the U.S. district court is prohibited from using its discretion.

In summary, then, with regard to title V, we believe that title V would establish a new system of economic control. The FTC and the Antitrust Division would be in a position to develop mathematical models of an ideal competitive system, which would, hopefully, be congruent.

Certain acquisitions would fall outside the limits of those models. By screening all acquisitions covered by title V, which would cover all but trivial acquisitions, these agencies could police the entire economy to assure conformity with their models.

Most acquisitions not in conformity with these models could be postponed and, perhaps, stifled by administrative fiat, chiefly under proposed section 23(c).

Acquisitions by large covered companies not in conformity with these models would be postponed for years, chiefly under proposed section 23(d).

We resist any such vast grant of power to unelected government officials as being antithetical to the free enterprise system.

Let me go quickly, now, to a brief discussion of the nolo contendere provisions, as contained in title VI.

We opposed title VI of S. 1284 which would require a plea of nolo contendere entered in a criminal proceeding under the antitrust laws to be treated as prima facie evidence against such defendant in a subsequent civil action.

Obviously, if this legislation were to become law, most defendants facing a possible treble damage suit would choose to litigate rather than plead nolo contendere.

Therefore, passage of title VI could result in long, costly trails, with the financial burden heaviest on the smaller business defendant and further clogged court dockets; it would result in tie-ups of Justice Department Antitrust Division manpower needed to investigate and prosecute violations of the antitrust laws in general. It is clear that the public interest in obtaining speedy and substantial relief in antitrust cases brought by the Government would not be served by this proposal.

We would argue that the necessary flexibility afforded to both the Government as well as the defendant by the nolo contendere plea would, in effect, be eliminated by title VI.

Let me go now to the conclusion of my statement, and then I will be glad to answer any questions that you may have, Mr. Chairman.

Noting that title II would expand use of civil investigative demand; title III would increase penalties under the FTC Act; title IV would broaden the use of the parens patriae concept permitting State attorneys general to file suit for alleged violations of Federal antitrust laws; title V would introduce uncertainty and delay into planned corporate mergers; and title VI would render futile use of the nolo contendere plea and thereby destroy its utility, NAM must necessarily oppose S. 1284 and urge that this subcommittee not report out the bill.

Thank you, Mr. Chairman.

Senator HART. Thank you very much, Mr. Godown. One of your last comments bore on section 23(d) and the restraint on discretion by the part of the court.

Mr. Kauper yesterday made the same point, and I know that our staff and those from the Department are attempting to respond in part, at least, to that problem which, I think, is a legitimate concern.

I know that in 1962, your position was in opposition to what became the CID law. As introduced back then, the bill contained much of the business that you are now testifying against in the new bill, and Congress did respond in large part to the precautions you voiced then.

Has your experience since 1962, under the CID Act, indicated any abuse of the existing law?

Mr. GODOWN. I cannot testify to such abuse.

Senator HART. Now, yesterday, the Assistant Attorney General, Mr. Kauper, said that except for the repeal of the fair trade laws—the McGuire and Miller-Tydings Act—the No. 1 antitrust legislative priority of the administration is the enactment of this title II, with some modifications that he suggested. I don't have his testimony with me.

Our impression is that the modifications that he identified do not conform to the objections that you now raise. I state that more for the record than to get a reaction.

My own feeling is that the ability to get oral testimony would greatly facilitate an investigation. And if third parties have documents that are relevant, the Department should be enabled to get that kind of evidence, otherwise I wouldn't introduce the bill.

But my question is, have you ever run into third parties—innocent third parties—who have been unfairly set upon by the subpena power

of the SEC, or the Power Commission, or the CAB or the other regulatory agencies in town? These agencies do have the equivalent, really, of what we are seeking to get for the Department.

Mr. GODOWN. Again, Mr. Chairman, I cannot testify directly that I have knowledge of such abuses that have occurred.

But, as I have put into the record, our concern is that expansion of usage of the CID, in the fashion suggested, would lead to fishing expeditions; to overzealous activity on the part of a, perhaps, politicized Department of Justice—although I don't make that as a charge.

But, nevertheless, certainly, that remains as a possibility. Our difficulty with the concept—and I am very conscious of the fact that I am appearing before you as representative of 13,000 major corporations who support the National Association of Manufacturers, and I mention that to put my remarks into context—our difficulties are that we have a feeling that this could lead to this overzealous use in terrorem, so to speak; that people would be terrified, by virtue of the fact that the Department of Justice is there with a civil investigative demand, and they are going to take testimony on the record.

It also is quite possible that people in oral testimony might, conceivably, be more willing to badger their neighbors, so to speak, or to allege to or allude to potential anti-competitive activities on the part of their own competitors.

They might be more likely to do that than if they were confined to stating so on a written document. Now, surely, their testimony is going to be under oath, and perjury would come in if they were testifying in an untruthful fashion in some later court proceeding.

But, nevertheless, we do feel that there is more of an inhibition to making a written unsubstantiated statement than there is to making an oral unsubstantiated statement.

I guess I should inquire of counsel, would, in fact, the oral testimony be under oath?

Mr. NASH. Yes, sir.

Mr. GODOWN. I had so understood the bill.

Senator HART. I won't ask you to agree with me, but I conclude that you think that, logically, the proposal makes sense, but because human hands would be involved in its application, maybe we ought not do it?

Mr. GODOWN. Let the record indicate that the witness responded not.

Senator HART. Mr. Chumbris?

Mr. CHUMBRIS. Thank you, Mr. Chairman. I have just a couple of things. In previous years, the many titles that we have in this bill, have been heard as separate bills—premerger 85th and 86th Congresses; CID, the 86th and 87th Congresses; nolo contendere, in the 89th Congress; parens patriae, in the previous Congress, the 93d—and has also been heard in the 94th.

As a matter of fact, the House subcommittee reported out the bill yesterday.

Senator HART. That is what I was told.

Mr. CHUMBRIS. Also, the title dealing with "in or affecting commerce" has been heard over the years in its separate bills. Senator Moss' S. 642 and others includes the "in or affecting commerce" provisions.

And the increased penalties provisions of S. 1284, although it might be new with FTC, we have dealt with it for years and it was enacted into law in the previous Congress.

I only relate these because that was one of the contentions Senator Hruska made yesterday. All of these issues are so complicated that it is difficult enough to study just one of these subjects without trying to roll all seven or eight into one bill.

Mr. GODOWN. May I comment, Mr. Chumbris? My staff and myself have been engaged in a more than a couple of weeks long, and including a few weekends, wrestling match, to bring what we considered to be cogent reflections to the attention of the subcommittee.

Indeed, it is a very, very large plateful of food to handle.

Mr. CHUMBRIS. Now, going back to what I took up with Mr. Nader this morning——

Mr. GODOWN. Is that Ralph Nader?

Mr. CHUMBRIS. Mr. Ralph Nader, yes, this morning. When I quoted from the statement of Mr. Mueller.

> Organized labor may also cause seller inflation if it is successful in demanding wage increases that exceed increases to its productivity. This is usually called cost-push inflation—a pushing up of production cost by labor.
>
> While this kind of labor-oriented cost-push inflation could theoretically occur in any industry with powerful labor unions, it most often occurs in those industries in which strong labor unions bargain with concerns having substantial market power.

Now, this question was given to Dr. McCracken and Dr. Moore by Chairman Hart. Dr. McCracken said:

> Obviously, as you were reading this, for example, I was thinking about what I suppose was the most flagrant case of runaway wage inflation in the last several years, namely, in the construction industry."
>
> Again, it is a rather fragmented type of industry, and a frequent diagnosis there has been that the problem arises because there is no power on the other side.

And a couple of other industries that have been mentioned in other parts of our hearings are the transportation industry, where it is also fragmented; and in the services field industries.

Increased costs and increased prices of products are probably higher in the services industry than any of our industries in the United States. This brings us to the point made in these hearings, that inflation is one of the main reasons for introducing these bills such as S. 1284.

Here, all of these provisions are only related to industry and does not include union labor which also has a significant role in an inflationary period. What the actual price is going to be must be judged by the costs, and labor costs are a most important percentage of total costs that determines that actual price a consumer pays.

Do you have a comment on that?

Mr. GODOWN. I would agree with you, Mr. Chumbris, if your thesis is that bigness is not bad, per se. If you don't, then I do mean to state for the record—as NAM previously stated in hearings, Senator, before your subcommittee on the Industrial Reorganization Act—that there are obvious economies of scale, economies of size, et cetera.

There are some classic arguments which we put forward in defense of size, when it does make sense, and when it can be economically proven to make sense.

I would reiterate that position here. I would also agree with you, of course, that big labor, in our view, is frequently the impetus for a major increase in prices, because of their negotiating power.

Mr. CHUMBRIS. And one of the factors that came out during the course of our hearings on the Industrial Reorganization Act, part III, was when Dr. White—who was, I believe, a consultant to the subcommittee at the time, and did a special study for the subcommittee—pointed out that from 1949 to 1972, the increase for the automobile industry, in prices, was 38.1 percent; whereas, the increases under the Consumer Price Index were 78.8; more than double over that period of time.

As a matter of fact, it was taken from a chart from the Monthly Labor Review, so it is coming from a labor review, rather than from an industry reference.

Mr. GODOWN. Those are astounding figures.

Mr. CHUMBRIS. It is found on page 1956 of part III of our hearings on the Industrial Reorganization Act. As a matter of fact, as I read into the record this morning with Mr. Nader—Dr. Weston, Dr. McCracken, and Dr. Moore all agreed that in the concentrated industries, during this past inflationary period, the prices were raised at a slower rate than the prices of unconcentrated industries.

And when we take into consideration the construction industry, the services industry, and others which are unconcentrated, why, it seems to bear out that particular point.

Mr. GODOWN. I agree with the gentlemen, and our own information matches the facts as you have stated them for the record.

Mr. CHUMBRIS. I have nothing further, Mr. Chairman, and thank you, Mr. Godown.

Senator HART. Mr. Nash?

Mr. NASH. No questions.

Senator Hart. Mr. Finch, did you have anything you would like to add?

Mr. FINCH. Not at all. Thank you, Mr. Chairman.

Senator HART. Gentlemen, thank you very much.

Mr. GODOWN. Thank you, Mr. Chairman.

[The prepared statement of Mr. Godown follows. Testimony resumes on p. 239.]

PREPARED STATEMENT OF GENERAL COUNSEL RICHARD D. GODOWN, ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. Chairman, my name is Richard D. Godown. I am Senior Vice President and General Counsel of the National Association of Manufacturers. We are most pleased at the invitation to appear before you and give testimony on S. 1284, an omnibus antitrust bill.

NAM is a voluntary membership organization composed of large, medium and small companies whose combined output amounts to approximately 85% of the goods manufactured in the United States and who together employ 82–85% of those engaged in manufacturing. Antitrust law has a profound impact on the activities of these companies and, therefore, NAM has a keen interest in S. 1284, which proposes many changes in enforcement of antitrust law.

After a careful review of its provisions, NAM concludes that it cannot support S. 1284. Our reasons are spelled out in detail in our discussion of each title of the bill.

Before turning to our discussion of the bill, however, I would like to emphasize that NAM strongly favors " . . . equitable laws against monopoly and restraint of trade, and their fair and effective enforcement." On the other hand, it is NAM's stated position that:

> Individuals and business enterprises should be free, to the greatest extent practicable, consistent with law enforcement, from the harassment involved in and expense arising from ill-founded actions or proceedings brought under the anti-trust laws or the Federal Trade Commission Act.

Accordingly, NAM opposes enactment of S. 1284.

TITLE II: ANTITRUST CIVIL PROCESS ACT AMENDMENTS

The Antitrust Civil Process Act (15 U.S.C. 1311, hereafter referred to as ACPA) provides that whenever the Attorney General has reason to believe that any person, other than a natural person, under investigation may have documentary material relevant to a present or past antitrust violation, he may require its production by the issuance and service of a civil investigative demand (hereafter referred to as C.I.D.).

During the floor debates on S. 167 proposing the ACPA in the 87th Congress, and during the Committee hearings on the bill, there was considerable concern that the bill be interposed with adequate safeguards and proper limitations on the scope of the C.I.D. Mr. McCulloch, a member of the House Subcommittee which considered the bill, demonstrated the deep fear within the Subcommittee members as to the danger of improper use of investigative power:

> The grant of a civil process to the Attorney General does not mean, however, that he shall now be permitted to engage in fishing expeditions. Far from it. The fact that the Attorney General is the chief prosecuting officer of the Federal Government and the fact that an untrammeled right to obtain information could severely harm the rights of the individual have led the Committee on the Judiciary to *strictly circumscribe the extent to which the civil process may be used.* (Emphasis supplied.) [1]

A list of ways in which the Congress strictly circumscribed the extent to which C.I.D.s may be used was presented during the House debates:

> . . . Second, the use of a civil investigative demand is restricted to situations where a concern "is or has been engaged in an antitrust violation"—*not* in some activity which may develop into a violation in the future;
>
> Third; a civil demand is limited to the receipt of *documentary* evidence, *not* to the taking of *oral* testimony.
>
> Fourth, a demand may only be made upon a corporation, association, partnership, or other entity. It cannot be used to obtain personal documents of a natural person . . .
>
> Eighth, the Attorney General is prohibited from turning over to any other department or government agency documents received under a C.I.D. (Emphasis supplied). [2]

The proposed Title II of S. 1284 would destroy each of these safeguards specifically provided for in the ACPA by the 87th Congress to protect the rights of the individual, and ward off possible abuses of investigative power. It would extend the scope of the permitted inquiry far beyond what is reasonable and proper, to include investigation of "any activities which *may* lead to any antitrust violation," (including possible future violations in addition to those present or past; hence, an open invitation to fishing expeditions); oral and written interrogatories would be unnecessarily authorized in addition to the production of documents; innocent third persons (including natural persons) could be swept into the net of investigation, and perhaps tainted with criminality unnecessarily; and the evidence obtained by the C.I.D. could unfairly be use in other cases or regulatory proceedings totally unrelated to the one for which the C.I.D. was issued. It is NAM's view that each of the amendments proposed in Title II of S. 1284 should be rejected in order to uphold the high standards and the great concern expressed in the 87th Congress for the rights of the individual.

NAM objects to that portion of the Title II which would allow the C.I.D. to be served upon persons (including natural persons) not under investigation or even suspected of an antitrust violation. Such a proposal could traumatize innocent persons who may not be aware that they are not the target of the investigation, since the C.I.D. need only state the nature of the conduct constituting the alleged antitrust violation, a description of the type of information required (documents, oral or written interrogations) and the name of an antitrust custodian. Furthermore, innocent third parties could suffer economic setbacks as a result of being placed under the "umbrella" of an investigation; for example, if word should leak out to the public, they could become victims of "guilt by association." Clearly,

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[1] 108 Cong. Rec. Part Three, March 13, 1962, p. 3999.
[2] Ibid.

innocent persons should not be subject to the rigors of an investigation, nor should they be forced to spend the necessarily involved time and money unless they are the subject of the investigation.

This particular issue of whether to expand the arm of the C.I.D. to persons not under investigation was dealt with specifically by the 87th Congress, and positions in favor of limiting coverage to "corporations, firms, or associations under investigation" were taken by the American Bar Association [3] and the Attorney General's National Committee to study the Antitrust Laws. [4]

Mr. MacGregor, a Congressman from Minnesota, expressed serious reservation during the floor debates on S. 167 about the particular proposal which would have given the Attorney General the right to serve a C.I.D. upon any *person* (including natural persons) not under investigation:

> Much has been said about the need to avoid an unlimited fishing expedition . . . A careful reading of the hearings, and of the testimony of Mr. William Simon appearing on behalf of the American Bar Association, will clearly show the recommendation of the ABA that this power, the power to draft and serve these civil investigative demands, be limited to *companies under investigation* . . . (Emphasis supplied.)
>
> Thus, Mr. Chairman, at the appropriate time I will move to amend the bill . . . so as to insert after the word "persons" the words "under investigation." This would be a legitimate and proper restraint . . .[5]

The MacGregor amendment limiting the reach of ACPA to persons (other than natural persons) under investigation was adopted and became a part of the ACPA as finally enacted. NAM agrees that such a limitation is a "legitimate and proper restraint", and we believe it should be maintained in the ACPA. Accordingly, we recommend that the proposal in Title II which would, after the word "person" delete the words "under investigation," and would extend the meaning of person to include "natural" persons, be rejected.

NAM is further opposed to amending the ACPA to include within the scope of inquiry "any activity which may lead to an antitrust violation." It is logical and just to allow inquiries for the purpose of ascertaining whether a violation is *presently* occurring, or *has occurred* in the past, but to allow inquiries of activities which may lead to future violations would promote unlimited fishing expeditions and deal a great blow to individual freedoms.

Throughout the legislative history of the bill establishing the ACPA, there are numerous statements indicating that the bill was consciously limited to investigations of past and existing violation only.[6] The issue of whether to include "prospective" violations within the realm of investigation was rejected after opposition was received from the ABA, as well as the Attorney General's National Committee to study the Antitrust Laws. The Committee's report stated:

> We believe that the use of criminal processes other than for investigation with an eye toward indictment and prosecution subverts the Department's policy of proceeding criminally only against flagrant offenses and debases the law by tarring respectable citizens with the brush of crime when their deeds involve no criminality.[7]

NAM concurs with the view repeatedly expressed throughout the legislative history of the ACPA that inquiries of possible future violations go far beyond the government's reasonable needs, and are entirely susceptible to unwarranted abuse. It is possible that such an enlarged, overbroad scope of inquiry could easily become a prime means of harassment of innocent persons. If this proposal is enacted, we will surely be opening the door to 1984's "big brother". NAM urges you to reject this proposal, and maintain the safeguard consciously placed in the original bill to protect the individual by limiting the scope of the inquiry to past or existing violations.

The Report of the "Attorney General's Committee to Study the Antitrust Laws" also voiced disapproval of any subpena power that would permit prosecuting officers in antitrust investigations to summon sworn oral testimony by placing businessmen under oath. The Committee believed that such authority is readily

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[3] 108 Cong. Rec. Part Three, March 13, 1962, p. 3999.
[4] Report of the Attorney General's National Committee to study the Antitrust Laws, 1955, p. 343.
[5] 108 Cong. Rec. Part Three, March 13, 1962, p. 4004.
[6] Senate Report No. 451, 86th Cong., 1st Sess., pp. 2, 5, 6, 7; Hearing before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 86th Cong., 1st Sess., pursuant to S. Res. 57 on S. 716 and S. 1003, pp. 2, 10; 105 Cong. Rec. Part 11, pp. 14608, 14612; *United States* v. *Union Oil Company of California*, 343 F.
[7] Report, *supra*, pp. 343, 346.

susceptible to grave abuse, and is unnecessary.[8] NAM concurs with the Committee Report's view that the C.I.D. should be limited to the securing of documentary evidence only. Documentary evidence, which either constitutes the evidence, or contains evidence, is by far the most reliable type of evidence, surely more reliable than individuals with fallible memories or third persons (subpenable under Title II of S. 1284 as mentioned earlier) who might harbor evil motives toward their their competitors. Clearly, limiting the C.I.D. to the production of documentary evidence offers an effective safeguard for the right of individuals—this limitation was specifically imposed in 1962 as such a safeguard.[9] It should not be abandoned now.

Once again, similar proposals to those in Title II of S. 1284 were dealt with specifically by the 87th Congress and were consciously rejected. It was a major concern in both Houses that the Justice Department should not be allowed to pass on documents acquired under the C.I.D. procedure to other governmental agencies.[10] During Senate debates, Senators Keating of New York and Ervin of North Carolina expressed serious reservations as to the provisions of then proposed bill S. 716 (S. 167's predecessor) which would have allowed the Attorney General to transfer to other agencies subpenaed documents. Senator Keating stated:

> Complaint has been voiced by the ABA and the Association of the Bar of the City of New York to the provisions of this bill, which allow the Department of Justice to turn over subpenaed documents to congressional committees or any other agencies . . . There is no justification, it seems to me, for jeopardizing secret processes, developments, research, or privileged matters which might be contained in the material subpenaed by the Attorney General in the process of investigating antitrust cases.[11]

Senator Ervin's complaint was that if the Attorney General obtains the data for one purpose, he should pursue that purpose, and should not undertake to transfer the information he obtains either to the legislative branch or to any other administrative agency, without at least giving the injured person a chance to go into court and protect his rights.[12] But the proposal in Title II of S. 1284 would do exactly what Senators Ervin and Keating feared: it would allow other regulatory agencies to use the evidence obtained with the C.I.D. in other investigations and cases in addition to the specific investigation to which the issued demand relates. This proposal is totally unnecessary, inasmuch as other agencies have their own procedures for investigation. But more importantly, as Senator Ervin pointed out, the material acquired by the C.I.D. for one purpose, could then be used for purposes totally unrelated to the reasons which induced the original demand, without any regard for the rights of the person subpenaed by the C.I.D. Further, it totally discards the ACPA requirement that material be "relevant," by in turn allowing such information to be utilized in separate proceedings, where it may or may not be "relevant." Accordingly, we strongly urge that this proposal be rejected.

In short, under Title II of the proposed S. 1284 many of the safeguards specifically selected by the Congress in its enactment of ACPA would be destroyed—important individual rights would be abandoned. In an expressed desire to protect the individual, the 87th Congress specifically chose to limit the ACPA to:

(1) past or present antitrust violations;
(2) the production of documents only;
(3) subpenaing corporation, organizations, and entities but not natural persons;
(4) allowing the subpenaed information to be used only by the Justice Department,[13] and,

after these limits on the extent of the C.I.D. were circumscribed, Congressman McCulloch stated:

> "In summation, it may be seen that the Committee has sought to fashion a workable tool for aiding antitrust enforcement. In so doing, however, the committee has imposed effective safeguards to insure that the tool will not be converted into a weapon." [14]

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[8] *Ibid.*
[9] 108 Cong. Rec. Part Three., March 13, 1962, p. 399.
[10] 105 Cong. Rec. Part Two, pp. 14611–14613; 108 Cong. Rec. Part Three, pp. 4000–4003.
[11] 105 Cong. Rec. Part 2, p. 14613.
[12] *Ibid.*, p. 14612.
[13] 108 Cong. Rec. Part Three., March 13, 1962, p. 3999.
[14] *Ibid.*

NAM strongly urges that the proposals in Title II, which would effectively eliminate the above-mentioned important safeguards painstakingly thought out and included in the ACPA when enacted in the 87th Congress, be rejected. We cannot support legislation which would convert the C.I.D. from a "tool" into a "weapon."

TITLE III: FEDERAL TRADE COMMISSION ACT AMENDMENTS

Title III of S. 1284 contains only two substantive provisions. Section 301(a) would increase the penalties for failure to comply with FTC subpoenas and report orders. Section 301(b) is said to merely codify existing case law relating to the enjoining of such subpoenas and orders.

The proposed increase in penalties is from the present level of $100 a day to a minimum of $1,000 a day and a maximum of $5,000 a day. These are civil penalties, and under present law apply only in the case of failure to file annual or special reports ordered by the Commission. Section 301(a) additionally would extend the applicability of such civil penalties to failure to comply with FTC subpoenas, for which present law provides only criminal penalties.

We believe the ten to fifty-fold increase in civil penalties is unwarranted. This is not to say that NAM supports the wanton disregard of compulsory process issued by the Commission. Nonetheless, it is clear that there will always be situations where a respondent has what in good faith are believed to be valid reasons for legally contesting such process. However, by drastically increasing the penalties which might be imposed if such a contest fails, Section 301(a) would have an unfortunate chilling effect on the assertion of legal rights by respondents.

It is inadequate to assert that there will be no penalties if a respondent has what proves to be a valid challenge. Frequently, the legal issues may be close and of uncertain resolution. A good example is the FTC's controversial line-of-business report. Compliance with such report has been challenged in Federal courts in both Delaware and New York.[15] In Delaware, the plaintiff companies were successful in obtaining a preliminary injunction against FTC enforcement of the report; in New York the plaintiffs were denied such an injunction. It is obvious, whatever the ultimate outcome, that the challenges in these cases are not frivolous but rather have serious merit. In addition, cases of this nature have the salutory effect of acting as a check upon the otherwise unbridled exercise of the Commission's information-gathering authority. The proposed increase in civil penalties is of such large magnitude that it will predictably deter the raising of legitimate but judicially uncertain challenges and, therefore, such increase in NAM's view is not sound legislative policy.

For the same reason, we oppose the extension of civil penalties to cover subpoenas. The availability of criminal sanctions, as now provided under present law, is sufficient deterrent against frivolous or unreasonable refusals to comply with FTC subpoenas.

Since we do not believe that Section 301(a) should be enacted, and since Section 301(b) would add nothing to present law, NAM recommends that Title III of S. 1284 be deleted entirely.

TITLE IV: PARENS PATRIAE

In brief, where antitrust violations are alleged to exist, S. 1284 would empower the attorney general of a state to bring an action in federal district court in the name of the state as *parens patriae* of the citizens of that state for damages they personally sustained or as a class action. Similarly, any state attorney general could institute a *parens patriae* suit for damages to the general economy of the state or its political subdivisions or could bring suit on behalf of any or all political subdivisions of that state for damages each had sustained.

S. 1284 would permit recovery of aggregate damages—without separate proof of individual claims—and proof of damages could be accomplished through statistical sampling methods, on pro rata allocation of "illegal overcharges" or "excess" profits or through any other method of estimating aggregate damages which the court found reasonable and would permit.

S. 1284 also provides that whenever the U.S. Attorney General brings an action which could be maintained by a state attorney general, he must give the latter notice and if suit is not brought by that official, then the U.S. Attoreny General is thereafter deemed *parens patriae* of the citizens of that state and may bring suit on their behalf.

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[15] *A. O. Smith Corporation* v. *FTC*, Civ. Action No. 75-15, D. Del.; *Aluminum Company of America* v. *FTC*, 75 Civ. 17, S.D.N.Y.

Finally, where a federally funded state program is affected by antitrust violations, a state is entitled to treble damages for overcharges or other damages. The U.S. Attorney General may intervene in a suit brought on behalf of a state or may institute such a suit himself if the state attorney general fails to act after notice.

It is obvious that this legislation is intended to overcome the Supreme Court decision in *Hawaii* v. *Standard Oil* [16] wherein the court held that a state may not sue for damages to the general economy under Section 4 of the Clayton Act because proof of such injury, even if established, does not qualify as injury to a state's business or property as required under the statute. Moreover, in *California* v. *Frito-Lay* [17] the 9th Circuit Court of Appeals held that California could not maintain a *parens patriae* action to recover damages for its citizens as a result of alleged antitrust violations because such suits were not justified on the basis of the historical role of states in such actions. The court said the absence of specific statutory authority was determinative. S. 1284 seeks to remove this limitation.

We believe that Section 4 of the Clayton Act with its provisions for private actions and treble damages constitutes a strong deterrent. The possibility of multiple private attorneys general bringing suit is a sobering thought, causing corporation counsel to advise caution and restraint when new activities are considered in areas where the law is uncertain.

Injury to general economy

In the *Hawaii* case the court also took direct cognizance of the difficulty in determining damages saying that "measurement of an injury to the general economy . . . necessarily involves an examination of the impact of a restraint of trade upon every variable that affects the state's economic health . . . a task extremely difficult in the real economic world rather than an economist's hypothetical model." [18]

We believe that the manifest difficulty involved in any rational attempt to measure and apportion antitrust damages to the general economy of a state or its political subdivisions provides strong argument for deletion of this provision from the bill.

Aggregate damages

Under Section 401 of S. 1284 the state "may recover the aggregate damages sustained by the persons or political subdivisions on whose behalf the state sues without separately proving the individual claims of each such person or political subdivision." It is a horn-book knowledge that a litigant suing for treble damages under Sec. 4 can recover only if he is first able to establish a violation, which in fact proximately injured him, in an amount measurable in dollars and not subject to speculation. Thus, although Section 401 would seem to acknowledge the necessity for establishing *the amount of damages*, nevertheless, it remains silent on the question of proof that individual citizens have *in fact been damaged*. It must be kept in mind that the actual fact of damage is not established unless each citizen can show proximate injury. Under traditional antitrust law concepts this necessitates determining these facts, person by person. If Section 401 is intended to alter this concept, then it is far reaching indeed and stretches to the realm of punitive legislation. If this is the intent, we believe that reliance should be placed upon the newly enacted Antitrust Procedures and Penalties Act,[19] which significantly increased both the corporate and individual fines for antitrust violations as well as extending the possible jail term to three years, rather then introduce the novel concepts of Section 401 into law. There can be little doubt that its enactment would open the way for damage awards out of all proportion to any injury sustained.

Conclusion

The courts have been wrestling with the problem of damages flowing from antitrust violation from the very inception of these laws. The knotty problems of proper delineation of plaintiffs, proper determination that damage has occurred, just assessment of its amount and judicious selection of which plaintiffs shall be awarded how much make up the whole of treble damage litigation. To attack the problem as though defendant possesses a "pot of gold" which ought to be dis-

[16] 405 U.S. 251 (1972).
[17] 474 F. 2d 774 (1973).
[18] 405 U.S. at 263.
[19] Public Law 93-528.

bursed leads to both practical and legal difficulties. Judge Medina, writing for the Second Circuit in *Eisen* v. *Carlisle & Jacquelin*, offered this opinion:

> ". . . [S]tatements about 'disgorging' sums of money for which a defendant may be liable, or the 'prophylactic' effect of making the wrongdoer suffer the pains of retribution and generally about providing a remedy for the ills of mankind, do little to solve specific legal problems. The result of this approach is almost always confusion of thought and irrational, emotional and unsound decisions." [20]

We note with pleasure that the kind of troublesome provisions which would permit duplicative recovery and also mandate that the U.S. Attorney General bring suit if the state attorney general did not, are missing from this bill. These facts notwithstanding, we are nevertheless called upon to record our strong objections to Title IV of S. 1284. We do not feel that alteration of antitrust law in the manner suggested would abolish inequities; rather it would create them.

TITLE V: PREMERGER NOTIFICATION

NAM totally opposes Title V and submits that it is unnecessary for the accomplishment of legitimate antitrust law enforcement.

Although "premerger notification" is the caption of Title V, we view prevention of mergers as its intention. And although prevention of *illegal* mergers is the avowed purpose of Title V,[21] the provisions of Title V allow prevention of any merger, without adequate legal safeguards.

We oppose Title V for two major reasons: First, it is unnecessary and, second, it grants government officials unwarranted arbitrary power.

A. There is no need for a new premerger notification system

NAM has consistently opposed legislative proposals for premerger notification. NAM witnesses appeared before this Subcommittee several times during the 1950s to testify against premerger notification bills.[22]

NAM is not here today to argue against the concept of premerger notification, however, but against the expansion of the *existing* premerger notification system proposed in Title V. Basically, our argument is that Title V is unnecessary because the premerger notification legislative proposals of the 1950s have already been substantially achieved.

The American Bar Association described the 1959 legislative proposals as follows:

> Subject to minor exceptions, each of the pending bills (S. 442, S. 724, and S. 1005) prohibits the acquisition of the stock or assets of another corporation, where the combined book value of the acquiring and acquired corporations is in excess of $10 million, until and unless 60 days notice has been given to the Government, together with detailed information as to the business of the corporations as specified in the bills.[23]

NAM submits that the Merger Notification Program, now enforced by the Federal Trade Commission,[24] is substantially identical to the premerger notification proposals of the 1950s and, accordingly, that no legislation is needed at this time.[25]

B. Title V grants unwarranted arbitrary power to government officials

Title V would be merely redundant if it simply "requires the Federal Trade Commission to broaden and keep in force its premerger notification reporting requirement." [26] It does much more.

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[20] 479 F. 2d at 1013.

[21] "Introductory statement of Senator Philip A. Hart," 121 *Cong. Rec.* S. 4869 (daily ed. March 22, 1975), hereafter "Introductory Statement."

[22] See, for example, *Hearings on S. 442 and S. 1005 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess. (1959), hereafter "1959 Hearings." During its testimony in 1959, NAM set out three main reasons for its opposition to a premerger notification requirement: 1) It is an "unwarranted interference with the freedom of business to conduct its legitimate affairs and make its own decisions in normal business matters." 2) It "would hamper and sometimes prevent the consummation of desirable business combinations." 3) "There has been no demonstration of a need for desperate measures of this nature to protect the competitive business structure of the economy." (1959 Hearings at p. 9.) This continues to be NAM's position.

[23] "Statement on Behalf of the American Bar Association in Opposition to S. 442, S. 724, and S. 1005," *1959 Hearings* at 153.

[24] 1 Trade Reg. Rep. Par. 4540.

[25] The key differences between the current FTC merger notification program and the legislative proposals of the 1950s are (1) only the FTC receives direct notification (the Antitrust Division does not, although the information is shared); and (2) only companies whose post-acquisition combined sales or assets will exceed $250 million need notify the FTC. The amount triggering notification in S. 1284 is $100 million; proposed Sec. 23(a), p. 25, lines 10–19. If the latter amount is the fundamental requirement of a successful program, then this subcommittee need only demonstrate that to the FTC, which can change its existing program.

[26] Introductory statement at S. 4868—S. 4869.

1. *Scope.*—Proposed Section 23(b)(3) expands the scope of premerger notification from large companies, by any definition, to "any person or persons engaged in commerce, or in any activities affecting commerce, . . ." [27] In addition, it directs the FTC to require filing of premerger notification reports with the FTC by such newly covered persons at least thirty days prior to the effective date of an acquisition.[28]

NAM vigorously opposes extending premerger notification requirements to virtually all U.S. companies. Such an extension would cover literally thousands of transactions with no legally significant anti-competitive effect and impose unjustified and pointless burdens on small and medium-sized companies.

Although proposed Section 23(b)(4) allows the FTC to "except classes of persons and transactions from the notification requirements," [29] NAM opposes such unlimited delegation of power to the FTC.

2. *Additional information demand.*—Proposed Section 23(c)(1) empowers the FTC and the Antitrust Division to "require the submission of additional information and documentary material relating to the acquisition." [30] The FTC would do so pursuant to the Federal Trade Commission Act and the Antitrust Division pursuant to the Antitrust Civil Process Act. Failure to produce the additional information in full, within the time specified, subjects the acquisition to postponement by either the FTC or the Antitrust Division.

Extension of the Antitrust Civil Process Act (ACPA) to encompass the activities contemplated in the proposed Section 23(c)(1) is opposed for the reasons stated in our discussion of Title II, above. NAM specifically objected to the extension of the ACPA (1) to natural persons, (2) to obtaining of other than documentary material, and (3) to involvement of persons not under investigation.

3. *Waiting period.*—Proposed Section 23(b)(1) establishes a statutory notification and waiting period of sixty days for large corporations. In this context a large corporation is one with total assets or annual net sales in excess of $100 million.[31] The statutory period begins to run from the day on which the premerger notification is filed with the FTC and the Antitrust Division. Proposed Section 23(a) explicitly prohibits acquisition by covered large companies until the expiration of the statutory waiting period.[32] There is no comparable waiting period or explicit prohibition of acquisitions for smaller companies covered by the proposed Section 23(b)(1).[33]

We oppose any mandatory waiting period. Business realities may require completing a transaction in fewer than sixty days, as the FTC has acknowledged under its current premerger notification program. Under "exceptional circumstances," the FTC states that "where the time schedule of such merger or acquisition does not permit timely filing, the special report should be submitted as promptly as possible." [34] Proposed Section 23(b)(1) is too rigid and unrealistic.

4. *Extension of waiting periods.*—But inflexible waiting periods are not the worst defects in Title V. Proposed Section 23(c)(2) allows indefinite extension of the statutory waiting periods, without adequate legal safeguards.

Proposed Section 23(c)(1) as we have already noted allows the FTC and the Antitrust Division to demand additional information "prior to the expiration of the periods specified in Subsections (b)(1) and (b)(3)," namely, 60 days and 30 days, respectively. Proposed Section 23(c)(2) would empower the FTC or the Antitrust Division to "extend the periods specified in Subsections (b)(1) and (b)(3)," in their discretion, if the demanded additional information "is not produced in full within the time specified." The acquisition would be postponed "for an additional period of up to thirty days beyond the date" on which the government agency notifies the party from whom additional information is demanded that it is *satisfied*. Finally, the proposed Section 23(c)(2) appears to limit relief to suits for a declaratory judgment instituted in the U.S. District Court for the District of Columbia.

We strongly oppose proposed Section 23(c)(2) because of its inherent potential for arbitrary and unjust action.

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[27] Proposed Sec. 23(b)(3), p. 26, lines 20–21.
[28] *Ibid.*, p. 26, lines 18–20.
[29] Proposed Sec. 23(b)(4), p. 27, lines 2–3.
[30] Proposed Sec. 23(c)(1) p. 27, lines 13–15.
[31] Proposed Sec. 23(b)(1), pp. 25–26, lines 22–24, 1–9. The FTC does not now impose a waiting period. See letter of FTC Chairman Dixon, released July 16, 1969, quoted in 1 Trade Reg. Rep. Par. 4540, note .20.
[32] Proposed Sec. 25(a), p. 25, lines 2–5, 20–21.
[33] Compare proposed Sec. 23(b)(3), p. 26, lines 16–22, which does not use the word "period" and appears to contemplate only a notification period, with proposed Sec. 23(c)(2), p. 27, lines 21–22, which would "extend the periods" in Subsections (b)(1) *and* (b)(3).
[34] 1 Trade Reg. Rep. Par. 4540, note .25.

First, the proposed section appears to allow only the remaining time within the 30- or 60-day periods for responses to the demand for additional information. If the government may "extend the periods" because the demanded information "is not produced *in full within the time specified*," then the extension must be made *prior* to the expiration of the original 30- or 60-day notification periods. This might require a company to produce voluminous information within a matter of days in order to avoid postponement of a merger.

Second, once the notification periods are extended, they become open-ended. This provides an incentive to demand additional information in order to avoid having to make any decision on the merits within the original statutory period. Such an escape will appear overwhelmingly inviting to government officials who cannot analyze all the data needed for an objective determination within a 30 or 60-day period and who do not want to be criticized for implicitly allowing an acquisition which is later subject to litigation.

Third, since demands for additional information can be made on an enormous number of persons,[35] the parties to the acquisition may have no control over the submission of the demanded information within the deadline. Thus, they would be subjected to delay that might prejudice the acquisition through no fault of their own. This is unfair.

Fourth, proposed Section 23(c)(2) would limit judicial review of extended and open-ended waiting periods to actions brought by persons from whom additional information is demanded and from whom notification of satisfaction is "unreasonably withheld" by government officials.[36] Thus, the parties to the acquisition would be precluded from seeking declaratory relief if the demand for additional information that triggered the extension was made on a person not related to the acquisition. This is unjust.

Fifth, judicial review would be limited to civil actions for declaratory relief instituted in the U.S. District Court for the District of Columbia. Why is injunctive relief implicitly denied aggrieved parties? Why must plaintiffs file suit in the District of Columbia rather than the district in which they reside or do business?

Sixth, we note that proposed Section 23(b)(3) does not mention or appear to contemplate a mandatory waiting period. By its terms, it appears to acknowledge "the effective date of an acquisition." It would be especially unfair to allow suspension of such an effective date under the loose, arbitrary procedures of the proposed Section 23(c)(2).

5. *Postponement "pendente lite"*.—Where proposed Section 23(c)(2) allows postponement of *all* acquisitions by indirect administrative delay, proposed Section 23(d) allows postponement of acquisitions of covered large companies by direct court order.

If a proceeding is instituted within the notification and waiting period of Section 23(b)(1), alleging that an acquisition violates Section 7 of the Clayton Act or Sections 1 or 2 of the Sherman Act, and the FTC or the Antitrust Division "certifies . . . that it . . . believes that the public interest requires relief pendente lite . . ., the court shall enter an order that such acquisition shall not be consummated" until the FTC order or the court judgment is final.[37]

Since the public interest clearly requires prevention of illegal mergers, it seems safe to assume that a certification that the public interest requires relief pendente lite will be filed in every proceeding or action falling under the proposed Section 23(d). Not to file such a certification could be viewed as an acknowledgment that the allegation of illegality is weak or questionable.

Yet proposed Section 23(d) appears to require the court to enter an order postponing the acquisition *automatically*, without discretion, whenever a certification is made. (It is standard legal interpretation that legislative use of the word "shall" imposes a mandatory requirement or duty.) Why are the U.S. District Courts prohibited from using their discretion? Why is this method imposed in preference to an injunction, which accomplishes the same objective of preserving the status quo? Is it perhaps because to do so would inject an element of chance into this new system of control?

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[35] Proposed Sec. 23(c)(1) provides that demands for additional information may be made on "any person or persons subject to the provisions of this section, or . . . any officer, director, or partner of such person or persons." Both proposed Sections 23(b)(1) and 23(b)(3) apply to any person or persons engaged in commerce or in any activities affecting commerce.

[36] Only a "person entitled to *such* notification" from government officials may bring an action. See proposed Sec. 23(c)(2), p. 28, line 1-5. (Emphasis added.)

[37] Proposed Section 23(d), pp. 28-29, lines 18-25, 1-6.

C. Summary

We believe that Title V would establish a new system of economic control. The FTC and the Antitrust Division would be in a position to develop mathematical models of an ideal competitive system (which would hopefully be congruent). Certain acquisitions would fall outside the limits of these models. By screening all acquisitions covered by Title V, which would cover all but trivial acquisitions, these agencies could police the entire economy to assure conformity with their models.

Most acquisitions not in conformity with these models could be postponed and perhaps stifled by administrative fiat, chiefly under proposed Section 23(c).

Acquisitions by large covered companies not in conformity with these models would be postponed for years, chiefly under proposed Section 23(d).

We resist any such vast grant of power to unelected government officials as being antithetical to the free enterprise system.

TITLE VI: THE NOLO CONTENDERE PROVISION

NAM opposes Title VI of S. 1284 which would require a plea of *nolo contendere* entered in a criminal proceeding under the antitrust laws to be treated as prima facie evidence against such defendant in a subsequent civil action. Obviously, if this legislation were to become law, most defendants facing a possible treble damages suit would choose tc litigate rather than plead *nolo contendere.* Therefore, passage of Title VI could result in long, costly trials (with the financial burden heaviest on the smaller business defendant); further clogged court dockets; and tie-ups of Justice Department Antitrust Division manpower needed to investigate and prosecute violations of the antitrust laws in general. It is clear that the public interest in obtaining speedy and substantial relief in antitrust cases brought by the Government would not be served in this proposal.

In *U.S.* v. *Cigarette Merchandisers Association, Inc. et. al.*, 136 F. Supp. 212 (1955), it was noted that the committee which drafted the Federal Rules of Criminal Procedures retained the *nolo contendere* plea to meet a need particular to antitrust violations. We agree, and would argue that the necessary flexibility afforded to both the Government as well as the defendant by the *nolo contendere* plea would, in effect, be eliminated by Title VI in the following ways:

First.—In cases where the Government considers that its prosecution stands little chance of success, or where the litigation is proceeding poorly from the Government's side, the case can often be ended by the acceptance of a nolo plea. A sentencing court, on a plea of nolo, may impose as severe a fine as upon a plea of guilty, and by accepting the the nolo plea, the Government can avoid a long, expensive trial which it would most likely lose.

Second.—Many defendants, although innocent, may not want to undergo the expense of a lengthy trial, or the attendant adverse publicity which could also harm them economically, so they choose to plead nolo and accept a fine. These economic considerations receive considerable weight from smaller businesses. However, if the nolo plea will be given prima facie effect in a later treble damages suits, these defendants will be at a crossroads and, under Title VI, either road could mean economic ruin for the smaller business. Similarly, any large business enterprise would be more prone to contest an antitrust action under these circumstances because the possible consequences of not doing so would be unacceptable.

Third.—Other defendants, although innocent, may have legitimate trade secrets which could, if brought out in the open, do them harm if a competitor should become aware of them. These defendants would rather plead "nolo contendere" and pay the fine rather than risk public exposure of this vital information. Title VI would pose a formidable barrier to these defendants.

During 1973 hearings before the House Subcommittee on Monopolies and Commercial Law, the Hon. Bruce B. Wilson, Deputy Assistant Attorney General, Antitrust Division of the Department of Justice, presented his view on various consent decree bills [38] some of which, like Title VI of S. 1284, would have resulted in increased litigation:

> From time to time private parties have opposed the entry of consent decrees for the reason that, if the Department does not go to a final litigated judgment, the prima facie use of the judgment by private parties in treble damage actions is lost.
>
> We have in the past and will in the future continue to oppose attempts by private parties to force us to continue litigation so that their case can be

[38] Nolo Contendere has been held a "consent decree" in *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 Fed. Supp. 366 (1939).

made out. *If the relief we obtain by consent decree is adequate, further litigation by the Government would tie-up our resources—very limited resources—which might otherwise be employed to prosecute further violations of the antitrust laws.*[39] (Emphasis supplied.)

NAM agrees with Mr. Wilson's statement, which rightly places the public's interest in obtaining expeditious, adequate relief from antitrust violations predominant over "making the case" for private litigants.

A prominent law review article entitled "Antitrust Nolo Pleas" referred to the Government's willingness to accept nolo pleas, pointing further to the Congressional intent behind Section 5(a) of the Clayton Act [15 U.S.C.A. § 16(a)]. The intent apparently was not to "tie the Government's hands" to prevent acceptance of such consent decrees:

> While private actions are important because they compensate victims as well as deter violations, the Government should not be denied for this reason the right to "settle" a case, as it has no obligation to bring the case in the first place. Congress clearly provided that consent decrees in civil cases would not be binding in later private suits perhaps *partly because it did not want to tie the Government's hands*. Thus one proper reason for accepting the nolo plea is that the Government is willing to accept the plea and save its own expenses.[40] (Emphasis supplied.)

It is NAM's view that Title VI effectively "ties the Government's hands". By in effect closing off the use of the *nolo contendere* plea for all practical purposes, it prevents the Justice Department from settling cases it would often like to settle, forcing it to spend large amounts of time and money litigating instead of pursuing violators. It prevents the Justice Department from obtaining what it deems in many cases to be *adequate* relief.

It is our contention that "nolo contendere" offers adequate relief because:

(a) The sentencing court may impose as severe a fine as upon a plea of guilty. *U.S.* v. *Cigarette Merchandisers Association, Inc., et. al.*, 136 F. Supp. 212 (1955.)

(b) A defendant cannot escape the fact that there has been a *conviction*, making an individual, after a subsequent conviction, a *multioffender* and subject to punishment as such. Also, a previous conviction under a plea of nolo has been held admissible to attack the credibility of a witness. *U.S.* ex. rel. *Bruno* v. *Reimer, Commissioner of Immigration*, 98 F. 2d. 92 (1938).

(c) A plea of nolo is not accepted automatically. It is discretionary with the court.

(d) As mentioned earlier, it permits the Government to pursue a case to an acceptable conclusion even though chances of success are slim.

TITLE VII: MISCELLANEOUS

NAM takes no position for or against the three substantive sections in Title VII. We would advise, however, that the views of the Department of State, legal experts, and organizations expert in international trade and investment be sought on the proposed Section 22 of the Clayton Act (Section 703).

CONCLUSION

Accordingly, noting that Title II would expand use of civil investigative demand; Title III would increase penalties under the FTC Act; Title IV would broaden the use of the *parens patriae* concept permitting State attorneys general to file suit for alleged violations of federal antitrust laws; Title V would introduce uncertainty and delay into planned corporate mergers; and Title VI would render futile use of the *nolo contendere* plea and thereby destroy its utility, NAM must necessarily oppose S. 1284 and urge that this Subcommittee not report the bill.

Senator HART. We are adjourned, to resume on June 3.

[At 1:45 p.m., the proceedings were adjourned, to reconvene on June 3, 1975.]

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[39] Hearings before the House Subcommittee on Monopolies and Commercial Law, September 20, 26, 27, and October 3, 1973, pp. 63, 87.

[40] "Antitrust Nolo Pleas", 79 Harv. L. Rev. 1475 at 1487.

S. 1284—THE ANTITRUST IMPROVEMENTS ACT OF 1975

TUESDAY, JUNE 3, 1975

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY
Washington, D.C.

The subcommittee met at 1 p.m. in room 2228, Dirksen Senate Office Building, Hon. Philip A. Hart (chairman of the subcommittee), presiding.

Present: Senators Hart and Hruska.

Also present: Howard O'Leary, chief counsel; Bernard Nash, assistant counsel; Monica Walters, appearing for Patricia Y. Bario, editorial director; Catherine M. McCarthy, chief clerk; and Peter N. Chumbris, minority chief counsel.

Senator HART. Let us be in order.

I expect Senator Hruska to appear very soon but because of schedule problems for some of us, later in the afternoon, I think we will begin the hearing now with our very distinguished witnesses.

Briefly, the hearings today and for the balance of the week are a continuation of the May hearings on S. 1284 and on S. 1637.

I am very grateful to the witnesses today who, burdened by their own difficult schedules, nonetheless accommodated the subcommittee by participating in the rescheduled hearing this afternoon. I take this opportunity to express both our thanks and apologies.

I believe that perhaps the first of the witnesses to present testimony will be the distinguished attorney general of New Jersey, William F. Hyland, who, I think will be reflecting the views of Governor Byrne as well.

If our understanding of the batting order you would like to follow is wrong, use your own list and proceed as you would like.

Mr. HYLAND. Senator, thank you very much, and I will have to remember in the future to be representing my Governor because I think that had something to do with my leading off.

Senator HART. I was going to say it is the earliest State admitted to the Union but that would not be true; I suppose Virginia would be.

Mr. HYLAND. No; we are the third.

STATEMENT OF HON. WILLIAM HYLAND, ATTORNEY GENERAL OF NEW JERSEY ON BEHALF OF HON. BRENDAN T. BYRNE, GOVERNOR OF NEW JERSEY

Mr. HYLAND. I want to express our support for S. 1284 and also S. 1637 with several minor language changes that we have put in the addendum to my prepared remarks and which I won't bother to go into at the moment.

Also, I would like to associate myself with the efforts that have been made in the House of Representatives through Congressman Rodino from our State on the parens patriae portion of the matters before this subcommittee which I think are most currently reflected in H.R. 6786, an outgrowth of H.R. 38.

Part of my concern over establishing more effective antitrust enforcement techniques for State government and the Federal Government as well, is the recognition that competition plays such an important role in the preservation of a healthy free enterprise.

And part of the effort to maintain the health of that enterprise, it seems to me, is to provide both the State and Federal governments with the tools they need to root out anticompetitive behavior wherever it is found.

I would like to tell you just a bit about our experience in New Jersey because I think I would be correct in saying that we have one of the toughest State antitrust laws in the country.

Our statute vests the attorney general with broad investigatory powers. During the short life of New Jersey's law, which came into being in 1970, we have built a sizable antitrust section and are continuing its growth even in the face of severe budget constraints.

Up to the present date, a number of major actions in both State and Federal courts, have been brought and we have also joined other States in a number of significant multidistrict cases.

One of the interesting and, I think, very useful applications of our antitrust power has occurred within 2 years as a corollary to our criminal justice enforcement efforts.

In the area of political corruption, we have attempted to enhance the criminal justice statutes by going after anticompetitive behavior in the guise of political corruption. This, of course, can be financially devastating because it burdens citizens with unnecessarily high taxes and prevents open competition in a very important part of our society's activities.

Indeed, in one case involving Hudson County, we instituted an action in which over 200 individuals and corporations have been sued for damages resulting from their complicity in a kickback scheme which stymied free and open competition there and cost the taxpayers millions of dollars.

The civil case was brought quickly on the heels of both Federal and State prosecutions of public officials who had been parties to the conspiracy that had resuted in subversion of the bidding laws and improper practices.

More recently than that, within the past month, my office filed another major antitrust action against public officials and corporations in the Passaic County area who had been involved—we are charging—in bid rigging and territorial allocation practices since 1957.

As you may have read, we were unsuccessful in maintaining a criminal prosecution in that case because the operative investigative facts did not come to our attention until early 1974, and we were unable to establish beyond a reasonable doubt clear overt acts that continued this conspiracy to a sufficiently current date to come within our statute of limitations. So the judge entered a judgment of acquittal for the defendants.

However, we have now instituted an antitrust action to recover potentially millions of dollars for Passaic County and other govern-

mental units unencumbered by that particular statutory problem because the statute of limitations, in this instance, does not begin to run until we reasonably could have become aware of the facts that give rise to the cause of action.

In our case, that would have been early in 1974. So I am quite hopeful that while the defendants in the criminal case did escape what we consider to be actionable criminal conduct, we will be able to represent the public interest and get some restitution for the public by virtue of this civil proceeding.

Because we have been vigorous in designing and enforcing antitrust laws, we welcome the additional powers which the Antitrust Improvement Act of 1975 confers upon the States.

Several provisions of the bill are of particular importance to us. The act, for example, for the first time, gives the States the right to sue price fixers and others who violate the antitrust laws, suing them on behalf of classes and groups of citizens.

In the past, the courts have prevented the States from doing this and have forced the people of the States to rely on class action suits brought by private citizens as the primary means of recovering the money that price fixers and other antitrust violators have illegally taken.

In many instances, the number of citizens who have been injured is large, while the amount of each citizens loss is small. The notice requirements and other procedural requirements of the courts, and I might say the expense, of these actions have made private redress difficult or impossible.

I should interject that I think that there have been instances when some of these private cases have been settled, whereas under the direction of an attorney general it is conceivable that the case would have been pursued through trial, and even more meaningful damages recovered for the public.

So this bill before the subcommittee eliminates these difficulties and restores to the citizens of the States a powerful tool for vindicating their rights and recouping the moneys which have been wrongfully taken by antitrust violations.

Another major provision of importance is that which permits the States to recoup the moneys they have spent litigating these cases.

Once again in New Jersey, our antitrust statute was initially funded by what was characterized as a loan of $100,000 from the legislature. With this money, we set up a revolving fund out of which the expenses of the initial litigation were paid.

We have repaid the money to the general treasury and have now enmassed a fund that has reached the level of $3.6 million at the present time as the result of recoveries that have been made for the State of New Jersey. And this is aside from the moneys that have been recovered for local government units and for consumers themselves.

So we have a revolving fund that is very amply financing the expense of this work.

I think of equal importance are the provisions in the bill before the subcommittee which permit the States to sue for injuries to their economy which result from antitrust violations. Businessmen, who by virtue of their anticompetitive activity, have prevented new industries from developing, either by direct exclusion or otherwise, or who have

caused the cost of doing business in the States to rise, thereby contributing to both inflation and unemployment, should not be allowed to do this. And I think the bill will give some means of going after these situations.

The provisions of the bill encouraging the States to represent all or any of the political subdivisions are also extremely good because, obviously, the centralizing and coordinating of antitrust actions is quite important.

I also want to express our support for Senator Bayh's proposed amendment, which we think is innovative and will strengthen antitrust enforcement because this reaches unilateral criminal or fraudulent activity intended to exclude others from engaging in a commercial activity and will help to assure all competitors access to the markets.

The provisions of the bill, which allow pleas of nolo contendere entered from criminal prosecution to be used as evidence in subsequent civil action are worthy of note.

I am not sure whether to predict that permitting these pleas to be used in civil proceedings is likely to discourage pleas of nolo contendere or whether we will find that permitting those pleas to serve as prima facie evidence in later civil cases will not have a significant effect on the criminal prosecutions. But I think it is certainly worth a try.

I think, Mr. Chairman, that completes my direct presentation, most of which has been presented in written form, and I do not want to burden the committee by taking any more time for that reason.

Senator HART. Let me indicate, as I should have earlier, that your prepared statement and those of other witnesses will be printed in the record in full as though given.

Did you care, at this point, to have others make comment?

Mr. MILLER. Senator, may I respond to that inquiry?

Senator HART. Yes.

Mr. MILLER. As I understand the situation, Attorney General Hyland is here because of the fact that Governor Byrne of that State was not in a position to appear today and consequently he is standing in for the Governor.

[The prepared statement of Governor Byrne follows. Testimony resumes on page 258.]

TESTIMONY OF GOVERNOR BRENDAN T. BYRNE

BEFORE THE SENATE ANTITRUST SUBCOMMITTEE

Presented By: Honorable William F. Hyland
Attorney General
State of New Jersey

Mr. Chairman, members of the Committee, I am pleased to have this opportunity to testify in support of S. 1284, The Antitrust Improvement Act of 1975. All of us in government are deeply concerned with the state of our nation's economy as a whole, and the economies of our individual states. We share the responsibility for eliminating the inflation which has plagued us for so long. More important, we share the responsibility for eliminating the unemployment that has caused nearly ten percent of our citizens to lose their jobs and uncounted others to stop looking for work. These conditions strain the resources of both state and federal governments and deplete those of our individual citizens - we must do everything in our power to change them so that we can all, once again, enjoy the benefits of a free society and a vibrant free enterprise system.

The key to a healthy free enterprise economy is competition. In an economic system as large and complex as ours, we must use all our energy and skill to protect and foster competition. Specifically, this means that our law enforcement agencies at the state and federal levels must be armed with strong effective tools to root out anti-competitive behavior whenever it is found.

As some of you are undoubtedly aware, New Jersey has made great strides in this direction. Several years ago we enacted the toughest state antitrust law in the country. Our act vests the Attorney General with broad investigatory powers and has stringent penalty provisions. During the short life of New Jersey's law, we have built a sizable antitrust section, and are continuing its growth even in the face of severe budget constraints. To date a number of major actions in both state and federal courts have been brought. We have also joined other states in a number of significant multidistrict cases.

More important, we have been innovative in applying the antitrust laws to new areas - most notably in the area of political corruption. Anticompetitive behavior in the guise of political corruption can be financially devastating. It burdens citizens with needlessly increased taxes and prevents open competition in a significant section of our economy. Indeed, in one case, over two hundred individuals and corporations have been sued for damages resulting from their complicity in a kickback scheme which stymied free and open competition in Hudson County and cost the taxpayers millions of dollars.

Because New Jersey has been vigorous in designing and enforcing antitrust laws, we welcome the additional powers which The Antitrust Improvement Act of 1975 confers upon the States. Several provisions of the bill are of particular importance:

The Act, for the first time, gives the States the right to sue price fixers, and others who violate the antitrust laws on behalf of classes and groups of citizens. In the past, the Courts have prevented the States from doing this and forced the people of the States to rely on class action suits brought by private citizens as the primary means of recovering the money that price fixers and other antitrust violators have illegally taken. In many instances the number of citizens who have been so injured is large, while the amount of each individual citizen's loss is small, amounting to no more than a few dollars. The notice requirements, and other procedural requirements of the Courts have made private class actions difficult or impossible. This Bill eliminates these difficulties and restores to the citizens of the State a powerful tool for vindicating their rights and recouping the moneys which have been wrongfully taken by antitrust violations. Another major provision of the Act allows the State to recoup the moneys they have spent litigating these cases and dispersing recoveries. Such actions are enormously expensive and the resources of the States would be quickly depleted, without this provision.

Of equal importance are the provisions which permit the States to sue for injuries to their economies which result from antitrust violations. Businessmen, who by virtue of their anti-competitive activity have prevented new industries from developing, either by direct exclusion or otherwise, or who have caused the cost of doing business in the States to rise, thereby contributing to both inflation and unemployment, will no longer be able to do so with impunity. This Bill gives us the means to combat these previously unassailable activities of our less scrupulous businesses.

The provisions of the Bill encouraging the States to represent any or all of their political subdivisions are also extremely good. Presently in New Jersey, the State Antitrust Act gives our Attorney General this right. We have used it as a means of centralizing and coordinating antitrust enforcement activities throughout the State and have found it effective.

Senator Bayh's proposed amendment is innovative and will strengthen antitrust enforcement. This amendment, reaching as it does unilateral criminal or fraudulent activity intended to exclude others from engaging in a commercial activity helps assure all competitors access to markets. In addition, the proposal will give those concerned with the antitrust aspects of political corruption another potent weapon. Specifically, the possibility that treble damages may be levied in such cases provides a very strong deterrent to this form of political corruption.

The provisions of the Bill which allows pleas of nolo contendre entered in federal criminal prosecutions to be used as evidence in subsequent civil actions, are worthy of note. Under the present

practice, which gives no evidentiary weight to nolo pleas, these pleas cannot be used as prima facie evidence in later civil cases brought to recover money damages from the defendants. The Bill, which changes this, makes nolo pleas prima facie evidence in later civil cases. Since the nolo plea is used in many federal criminal cases, the states will benefit in their civil enforcement activities since they will be able to use both verdicts and pleas of guilty as well as nolo pleas as prima facie evidence in cases they institute.

A difficulty may arise if the change leads to both fewer federal criminal trials and nolo pleas. In this case the states will not be provided with litigated federal cases upon which to base independent actions. Because there is no way to predict the effects of this provision in federal criminal prosecution, one cannot judge, reliably, the long-term effect it will have on antitrust enforcement.

However, since nolo pleas are presently of little use in civil cases, and since one can still expect that many defendants will wish to avoid the stigma and bad publicity associated with pleading guilty in criminal antitrust actions, nolo contendre pleas are likely to retain their vitality. Thus, we believe that this provision of the Bill will benefit the States and aid antitrust enforcement.

Gentlemen, I thank you for having given me this opportunity to testify in support of The Antitrust Improvement Act of 1975. I am entering a more detailed analysis, with certain recommendations for change into the written record.

-- Presented in Person by:

Honorable William F. Hyland
Attorney General
State of New Jersey

Additional Comments Re: S. 1284,
"The Antitrust Improvement Act of 1975"

Respectfully Submitted By:

Honorable William F. Hyland
Attorney General
State of New Jersey

For:

Honorable Brendan T. Byrne
Governor of New Jersey

The "Antitrust Improvements Act of 1975" (S.1284) proposes major changes in the federal antitrust laws (15 U.S.C. § 1 et seq. (1970)). This memorandum shall review the provisions of the proposed amendments and draw some conclusions as to their potential effect on state antitrust enforcement.

The proposed amendments are divided into seven titles. Briefly synoposized, they provide as follows:

Title I is a declaration of policy and reflects the congressional findings underlying the amendments;

Title II proposes amendments to the Antitrust Civil Process Act expanding the investigatory powers of the Department of Justice;

Title III serves to amend the provisions of the Federal Trade Commission Act relating to the imposition of penalties for failure to make certain reports and obey certain orders;

Title IV allows the States to proceed as *parens patriae* for injuries to their residents and the general economy resulting from violations of the antitrust laws. In addition this title allows the State to represent the interests of its political subdivisions in antitrust actions;

Title V establishes a premerger notification procedure;

Title VI changes the evidentiary weight to be afforded pleas of nolo contendere entered by defendants in federal criminal antitrust prosecutions in later civil actions;

Title VII deals with miscellaneous amendments.

The Declaration of Policy contained in title I reflects a continuing committment to a policy of free competition in the economy. The statement also reflects a Congressional determination that the level of concentration in various industries is linked to inflation, unemployment and the ineffectiveness of fiscal and monetary policies. And more importantly, from the view point of the States, that various state and federal regulatory policies have contributed to the decline in competition in various industries thereby contributing to the litany of evils set forth above. This Congressional finding may be read as a signal to both federal and state antitrust enforcement officials to increase their scrutiny of regulatory bodies and procedures. If this is the case then one may expect that state regulatory procedures will come under increasing attack in antitrust courts. Assuming that such procedures have contributed to a decrease in competition and that this has led to increased inflation, unemployment and the efficacy of both fiscal and monetary policy, then the policy deserves support.

Titles II and III by increasing the effectiveness of federal antitrust enforcement efforts will have indirect effects upon the State. As the effectiveness of federal enforcement is increased the states will benefit since they will be able to file companion suits for damages based on cases litigated by the Federal Government.

The provision of title IV creating a right to proceed as parens patriae will have a direct effect on the State--for this reason this title will be treated in detail. Title IV confers upon the States through their respective Attorneys General the right to sue under the antitrust laws as parens patriae in the Federal Courts on behalf of persons residing in the State (Section 4C(a)(1)), and for damages to the general economy of the State (Section 4C(a)(2)). In addition the section allows the State to sue on behalf of their political subdivisions for damages which they have sustained as a result of violations of the antitrust laws (Section 4C(a)(3)). In such a suit the State may seek both damages and injunctive relief (Section 4C(a)). These provisions reject the holdings of several recent Federal Courts disallowing parens patriae suits. Moreover, the title expands the type of damage recoverable under the antitrust laws to include those heretofore thought beyond

the reach of the Clayton Act.

Section 4C(a)(1) allows the Attorney General of a State to proceed "as parens patriae of the persons residing in that state, with respect to damages sustained by such persons . . . ." Further, the Federal District Courts are given the discretion to allow the Attorney General to be designated class representative "of a class or classes consisting of persons residing in that state, who have been damaged. . . ." Under the parens patriae provisions of this section the Attorney General of a State may seek to recover damages on behalf of persons residing within the State without the need for proceeding in the form of a class action. Alternatively, the section designates the Attorney General as a proper class representative for persons residing within the State who have been damaged as a result of violations of the antitrust laws. One interesting sidelight is that the definition of persons includes corporations or associations authorized by state or federal law, 15 U.S.C.A. § 12 (1970) therefore permitting the Attorney General to be designated class representative and sue on behalf of classes of corporations and associations injured by violation of the antitrust laws. This provision will substantially lessen the burden which the Federal Rules of Civil Procedure imposes upon a State wishing to recover damages for its residents through the vehicle of class actions. Further, and more importantly the parens patriae provisions furnish a vehicle other than class action for recovering damages suffered by residents.

The provisions of 4C(a)(1) must be read together with those of 4C(b) which establish a procedure for giving notice to residents. The Federal Rules of Civil Procedure, and the Due Process clause of the Constitution require that all parties and members of classes in class actions be given notice that their rights are being litigated. Such persons must also be given an opportunity to withdraw from the litigation if they do not feel themselves adequately represented or for any other reason. A recent Supreme Court case has held that individual notice must be given to all members of a class who are identifiable with reasonable effort and that the Plaintiff must bear the cost of such notice. Since both a class action or parens patriae suit may involve several thousands or millions of persons, this holding enormously increases the expenses of such litigation. Section 4C(b) provides that published notice is sufficient and that no other type of notice shall be required thereby reducing the expenses of litigation. This subdivision goes on to provide a means for persons to exclude themselves from the litigation.

Section 4C(a)(3) of the Act allows the Attorney General to proceed on behalf of any or all political subdivisions of the state for damages sustained by them as a result of violations of the antitrust laws. Because the New Jersey Antitrust Act has a provision centralizing antitrust enforcement in the Attorney General and depriving political subdivisions of the power to sue for violations of state or federal antitrust laws absent

the express permission of the Attorney General (N.J.S.A. 56:12 (1971)) the same result as contemplated by the amendments has already been achieved in New Jersey. Thus, this section will have little effect on New Jersey.

Section 4C(a)(2) allows a State to recover damages and seek injunctive relief with respect to damages to the general economy or any of its political subdivisions. A proviso to this section provides that such damages shall not be duplicative of those recovered in _parens patriae_ or class action proceedings. Exactly what types of injury will lead to recovery is unclear, although one might suppose anticompetitive activity which may be proven to have lead to an erosion of the State economy, or increased costs to economic entities within the State are within the pervue of this section.

Injury to the economies of political subdivisions are somewhat easier to grasp. An example would be a city in which all gas stations have fixed prices or where established businesses have acted in consert to exclude newcomers. Undoubtedly much case law development will be needed to provide meaning to this section. However, while the precise meaning of the section is unclear the principles which it embodies are worthy of support. Economies of states or their political subdivisions may be injured though anticompetitive activity-statutory recognition of this obvious fact and the attempt at providing a means of redress is both needed and refreshing. Litigation and litigation alone will determine the efficacy of this section.

All of the sections discussed above must be read together with the provisions of 4C(c)(1) which provides, generally, that in suits brought under Section 4C the states need prove only aggregate damages and need not establish the claims of each person or political subdivision represented. The section goes on to provide that aggregate damages may be proven statistically or through the prorata allocation of illegal overcharges or excess profits, as well as through such other reasonable means of estimating aggregate damages. This section provides several relatively simple means of proving damages. In addition to statistical proofs which have long been recognized by the courts the use of illegal overcharges or excess profits creates statutory measures of damages and provides a somewhat simplified means of establishing damages. This is not to say a simple means, for the problem of establishing that profits are excessive or what pro rata illegal overcharges are will be significant. The point is that the proposal creates a measure of damages the lack of which has long been a stumbling block in class action and has caused the courts to disallow _parens patriae_ suits in the past.

Section 4C(c)(2) provides for the pro rata distribution of any funds recovered from actions brought under section 4C to persons or political subdivisions as provided by state law, or in the absence of State law, as provided by the district court. In addition the section also provides for the collection of attorneys' fees and administrative expenses and the disbursement of any remaining funds to the State. Thus, the State will be allowed to recover the cost of litigating section 4C actions, thereby reducing the fiscal burden of such litigation in the long run. Undistributed funds revert to the State to use as it sees fit. The danger latent in this section is that it may provide motivation to defendants to prolong the litigation in an effort to make the short run costs of litigating so burdensome as to cause the State to terminate the action in a less than optimal way. Since this danger exists in all antitrust actions it need not be deemed overly significant. The most imporatnt aspect of this section, from the State's point of view, is that it provides for the recovery of monies expended by the State in conducting the litigation. One additional point which must be made with respect to the entire section 4C is that it strengthens the bargaining position of the State vis a vis antirtust defendants. The threat of a parens patriae suit on behalf of a large body of residents is significant and may be of great utility in negotiating with antitrust defendants. Thus, the overall effect of section 4C should be to strengthen State antitrust enforcement.

Section 4D(a) imposes upon the Federal Attorney General the duty to inform his State counterpart when the Federal Government has filed an antitrust action when the Federal Attorney General believes that the State would be entitled to bring an action based on substantially the same cause of action under section 4C. This provision cannot help but imporve the coordination of federal-state antitrust enforcement.

Section 4D(b) allows the Federal Attorney General to sue as parens patriae for the persons in a State when its Attorney General has failed to file a section 4C action within 90 days after the notice provided in sefion 4D(a) has been mailed. Subsections (c) and (d) provide for the distribution of any damages collected to the states for distribution to the persons residing in the State who were represented in the federal action. Thus, the section imposes upon the State the duty to distribute the funds in accordance with the procedures outlined earlier (see ¶ 1 above). Presumably, the State would be allowed to recoup any expenses it incurred in distributing the moneys and sums not distributed would escheat to the State. The benefits of these provisions of the Act are obvious. They allow the interests of the people of the State to be protected by the Federal Attorney General when the State Attorney General

chooses, for whatever reason, not to file suit. Moreover, this protection is gained at no expense to the State. A problem which the section poses involves Federal-State relations; that is, do the States want to allow the Federal Attorney General to litigate the rights of their residents, or the State's own rights to damages resulting from injuries to their economies or those of its political subdivisions? This, of course, is a question of State policy which must be decided.

Section 4E confers standing upon the States to sue for the entire amount of damages sustained in connection with injuries suffered by any federally funded program arising from violations of the antitrust laws. After the State has secured a recovery of damages, the Federal Government is entitled to its equitable share of the recovery for damages which it sustained as well as any expenses it incurred. Once the federal portion has been paid, the recovery is distributed to the State for disbursement as provided in Section 4D(d) (see p. 5 supra.). The section goes on to provide a setoff as to damages where both the Federal and State Governments have filed separate suits. The Federal Attorney General is given the right to intervene in an action commenced by the State in order to protect Federal interests. Additionally, he is given standing to sue on behalf of the State when the State's Attorney General fails to file suit within 90 days of the mailing of notice that the Federal Attorney General believes cause exists to bring an action under this section. An obvious difficulty with the section is that it does not provide for the disclosure to the State Attorney General of the reasons for believing that the antitrust laws have been violated. Nor does the subsection provide for release of information accumulated by the Federal Government to the States so that they may prosecute the action. Thus, the State may find itself in the awkward position of having been notified that an antitrust violation exists and lacking sufficient information to frame a complaint. Undoubtedly, the subsection contemplates that the State will conduct an independent investigation. There is a substantial doubt as to whether a sufficient investigation may be conducted within the 90-day period established by the section. However, since the State does not lose its right to sue if it delays beyond the 90 days, the effect on State antitrust enforcement will not be adverse. More importantly, the standing provisions will simplify cases involving entities receiving both State and Federal funds. Also, the notice procedure does foster coordinated antitrust enforcement and may lead to joint enforcement activity in these cases. Furthermore, the provision allowing the State to collect for treble damages for the entire amount of damages provides a strong incentive to bring actions where federally funded programs are involved, thereby making for more vigorous State antitrust activity with its attendant publicity. And lastly,

since the Federal Government must turn over to the States money in excess of the Federal Government's equitable share of the recovery and expenses, the State may gain financially even when it does not sue.

Title V of the Act establishes a premerger notification procedure compelling firms over a statutorily fixed size to notify the Federal Trade Commission and Antitrust Division of the Department of Justice that a merger is contemplated.

Section 5(a)(2)(A) of Title VI of the Act provides that pleas of nolo contendre entered by criminal defendants in antitrust actions shall be prima facie evidence against such defendants in civil antitrust cases as to all matters in the indictment necessary to sustain a jury verdict of guilty. Section 5(a)(2)(B) provides that the bill of particulars as well as all statements made in court on behalf of the defendant at the time of entering a plea of nolo contendre may be received in evidence against the defendant as an admission in a subsequent civil action. Essentially, this section narrows the differences between a nolo contendre and a guilty plea. Heretofore, a nolo plea could not be used as prima facie evidence in a later civil trial. The potential effects of this section on State antitrust enforcement are great. A significant number of State antitrust cases arise from federal criminal prosecution which result in a finding of guilt. However, many federal criminal prosecutions result in the defendant's pleading nolo contendre. As noted above present practice gives no evidentiary weight to such pleas in subsequent civil actions. Thus, treble damage actions would not result from such a plea. Assuming that men look to the consequences of their pleas, one can conclude that the current lack of evidentiary weight makes nolo pleas attractive. Since this Act gives evidentiary weight to nolo pleas, one would expect that defendants would be less willing to so plead. Assuming this to be the case, one would expect more litigated criminal cases and fewer nolo pleas. In any event State antitrust enforcement will benefit significantly from the proposed changes. An untoward consequence, however, may be that federal efforts will be hampered since more resources will be required to prosecute the criminal case load. The states will benefit since they will be able to use both guilty pleas and verdicts as well as pleas of nolo contendere as prima facie evidence in civil cases which they may institute to recover damages from the defendants. A difficulty may arise if the change leads to both fewer criminal trials and nolo pleas. In this case the states will not be provided with litigated federal cases upon which to base independent causes of action. Because there is no way to predict the effects of this provision on federal criminal prosecution one cannot judge, reliably, the effect it will have on State enforcement.

Title VII of the Act deals with a variety of matters. The most significant is the extension of the reach of the antimerger, price discrimination and exclusive dealing provision of the antitrust laws to include conduct which affects commerce. The present law requires that the conduct be engaged in commerce before it is prohibited by the antitrust laws. The proposed changes eliminate this requirement and proscribe such conduct when it affects commerce.

II

Senator Bayh's proposed Amendment to S. 1284.

Section 3A of Senator Bayh's proposal seeks to make an antitrust violation any criminal or fraudulent conduct specifically intended to exclude or contribute to the exclusion of any person from engaging in a commercial activity. To support a finding of illegality one need not show that there was concerted action among competitors, but merely that there was criminal or fraudulent conduct intended to exclude another from engaging in a commercial activity. Further, one need not show that the excluder and excluded were engaged in similar lines of commerce--that is that they were competitors. Anyone who seeks to exclude another from engaging in a commercial activity through criminal or fraudulent means violates the law. Moreover, since the amendment provides that one need not show that the person engaging in the criminal or fraudulent conduct is a monopolist or is likely to become one, the section reaches all persons who seek to exclude others from commercial dealings with third parties.

The potential significance of this provision on the State is enormous. As an example, let us pose a situation where a person pays money to a public official in order to secure a contract. This is criminal activity intended to exclude another and is, therefore, a violation of the antitrust laws giving rise to both criminal penalties and treble damages in a civil action. One cannot stress the significance of this proposal in recovering sums from corporations and individuals who participate in political corruption designed to exclude others.

This provision will also allow unilateral activity, which has normally been litigated under Section 2 of the Sherman Act, to be more effectively reached. Section 2 is directed at monopolists and those who attempt to monopolize. Case law has engrafted upon the section, a requirement that one show that the defendant, as a result of his unilateral act, would become a monopolist or that there was a dangerous probability of his so becoming. Senator Bayh's amendment eliminates this requirement and allows the fraudulent or criminal conduct of any individual, which excludes or tends to exclude, to fall within the ambit of the antitrust laws.

Section 3B of the proposed amendment allows the United States to recover a civil penalty of up to twenty percent of revenues generated by a corporation resulting from the sale of goods and services affected by an antitrust violation. Because the section provides that the penalty will be paid to the Federal Government it will have little effect on State antitrust activity.

RECOMMENDATIONS

1. Section 401, subsection 4C(a)(1): This section gives the courts broad discretion in molding a parens patriae suit once it has been filed. The court may convert the suit from a parens patriae one into a class action, at its discretion, upon a finding that the interests of justice so require. The precise effect of such a change is unclear. Let us suppose that a suit is brought by the State on behalf of all of its citizens against a group of oil companies for fixing the price of gasoline. Presumably the State could in one action represent all individuals and businesses. Let us suppose further, that the Court transforms the suit into a class action. In one class there are consumers, in another there are major non-governmental purchases of gasoline. If the Attorney General is the class representative of both classes - then the section does no more than create two groups. However, must the Attorney General be designated class representative? If he is not so designated then he loses control of the litigation. To correct this possible ambiguity we would recommend that the wording of section 4C(a)(1) be changed as follows:

> if the court finds in its discretion that the interests of justice so require, the court shall designate the Attorney General who has commenced the action as a representative of a class or classes . . . . (p. 19, L. 15)

2. Section 401, subsection 4C(a)(2): The use of the word "damages" in this subsection is troublesome. While there is good reason, given the traditional reticence of the courts to award damages in those parens patriae suits which have been allowed, for including the word "damages" in sections 4C(a)(1), (3), the use of this word alone in section 4C(a)(2) may be inappropriate. The section allows the states to sue as parens patriae for injury to the general economy. However, the wording of this section limits the states to suits to recover monetary damages, and limits the recovery which may be sought to monetary relief. Injunctive, or other equitable relief would, therefore, not be allowed. If the State is suing for damages to their economy there is no sensible reason for disallowing equitable relief. The effect of this section will be to cause the states to include in their complaint two causes of action--one as parens patriae seeking monetary relief and one as an individual litigant seeking injunctive relief. Since this is essentially duplicative and cumbersome it should be avoided.

However, the above result may not have been intended. The present wording of the section may be based upon or an analysis of past parens patriae cases, which may be read to hold that equitable relief is permissible in such suits while monetary relief is not. The problem is that the section may be read to limit suits brought under it to monetary relief alone. Since this will cause the difficulty discussed earlier, the wording of the section should be changed as follows:

> (2) as parens patriae with respect to injuries to the general economy of that State or any political subdivision thereof: Provided, that any relief shall not be duplicative . . . . (p. 19, L. 18)

3. Sections 4D(a) and 4E: Both of these sections require the Attorney General of the United States to notify his State counterpart when he believes that the State has a right to bring an action under section 4C of the act, or when he believes that an antitrust violation has occurred. Neither of these sections require that anything other than notice be given.

The notice required under section 4D(a) is intended to allow the State to file suit after a federal action has been brought, as a companion to it. Here, when the State receives notice of the federal action, state authorities may learn the substance of the various offenses charged and parties involved by reading the complaint.

The notice required by section 4E is intentionally different. Here the Federal Attorney General is informing the State of his belief that cause exists for bringing a civil antitrust action. The State is then allowed 90 days within which to file an action, after which the federal government may bring suit. The notice required by this section is adequate where the civil cause arises from a preceeding federal criminal prosecution since the nature of the allegations and parties involved will be reflected in the record of the criminal prosecution. However, where the civil cause is the only action brought and is not based upon a preceeding criminal action--the State Attorney General has no way of learning the nature of the purported offenses, the facts underlying them and the parties involved--that is he will have no basis for determining whether an action should be brought. In this case the State needs more than mere notice. The State must know who the United States believes is involved and the nature of the purported antitrust violations. Additionally the State will need

to know as much about the federal investigation as possible. Filing an antitrust suit is not a casual affair--it is generally preceeded by a substantial period of investigation, which is frequently longer than the ninety days allowed for in the section. In order for the States to take advantage of this provision one of two changes must be made, either the 90 days must be expanded to 150-180 days or, preferably, the federal authorities must be required to disclose some information to state authorities. The second alternative is more appealing because it allows the matter to be disposed of expeditiously and prevents investigations from becoming backlogged. Since the disclosure of some investigatory information will be beneficial in section 4D(a) situations, the recommendation which follows also applies to that section.

In order to remedy the problems discussed above we propose that the following be added to the last sentence in section 4D(a)

> such State Attorney General and shall provide him with a copy of any and all pleadings of whatever kind, to include criminal pleadings, upon which the action is based, and shall permit the appropriate state authorities to inspect any and all investigatory reports, and other relevant material of whatever kind which are not required by law to be kept confidential. (p. 22, L. 9)

In addition the following language whould be added to section 4E:

> for bringing such action. In addition he shall provide the State Attorney General with a copy of any and all pleadings of whatever kind, to include criminal pleadings, or where none are available with information regarding the names of those persons relevant to the action as well as a statement describing the antitrust violations believed to exist and disclosing the facts which form the basis of this belief. Further the Attorney General shall permit the appropriate state authorities to inspect any and all investigatory reports, and other relevant material of whatever kind which are not required by law to be kept confidential. (p. 23, L. 23)

Mr. MILLER. I am here as chairman of the Antitrust Committee of the National Association of Attorneys General and I have with me several individuals who would like to comment, if it is the committee's pleasure, on various provisions of the bill now being considered by the committee.

If you would allow me to orchestrate the presentation, I think perhaps we might save some time, and perhaps it would be most desirable to wait until the individual presentations are over and then any questions which you or Senator Hruska wish to present, we would be pleased to respond to.

With that in mind, if it please the Senator, I would like to present Gen. Ron Amemiya, who is the attorney general of Hawaii.

As you know, Senator, that State was involved in the *Standard Oil* case. General Amemiya was not the attorney general of Hawaii at that time but is thoroughly familiar with it and he would like to address himself to the parens patriae concept.

Senator HART. Thank you.

A completely irrelevant question which discloses my own age, how old are you?

Mr. AMEMIYA. Senator, I am 35 years old.

STATEMENT OF HON. RONALD Y. AMEMIYA, ATTORNEY GENERAL OF HAWAII, HONOLULU, HAWAII

Mr. AMEMIYA. Chairman Hart and members of this committee, my name is Ronald Y. Amemiya, attorney general of Hawaii, appearing on behalf of the State of Hawaii.

Initially, let me say that it is indeed an honor and pleasure to be able to appear before you and offer testimony in support of S. 1284.

Specifically, the State of Hawaii supports title IV, parens patriae, section 401.4c(a)(2), which allows State attorneys general to sue for recovery of damages and I quote from the section, "with respect to damages to the general economy of that State or any political subdivision thereof."

This is a very small section of this bill but it played and plays a significant role in the State of Hawaii. As you may be well aware, the State of Hawaii attempted to sue for damages to its economy in *Hawaii* v. *Standard Oil*, a case decided by the U.S. Supreme Court in 1972.

Recovery was denied by the Supreme Court of the United States, basically, because five justices of the Court could not find a legislative mandate in the Clayton Act for States to sue as parens patriae. The State of Hawaii is here to support passage of this bill and to press home that injury to the economy of a State can happen, and that such injuries may have great effects within State economies.

An example on the national scale should prove illuminating. We are all familiar with the recent economic dislocations which have been, to a large degree, the result of wrenching $30 billion from our Nation's economy in increased prices for oil.

This subtraction could not have come at a more inopportune time since our country had already been staggered under the burden of inflation and recession.

Part of the long road back has been the President's program of tax rebates which offers from $100 to $200 rebate of tax dollars to individual taxpayers.

Speaking for the average citizen, I do not think a $100 or $200 rebate means very much at all. I certainly cannot use this amount of money to increase my lifestyle to any great degree. Yet; I am informed by our State's economists that the Keynesian economic theory behind the rebate of injecting autonomous amounts of money into the economy to stimulate demand may be one solution to our national recession.

In the aggregate, the rebate amounts to billions of dollars, these dollars will be spent on essentials such as food, shelter, and clothing, which will create a demand for these goods, in turn, creating more jobs to produce such goods and will result in a "rippling effect" stimulating the economy and increasing productivity by amounts much larger than the $12 to $16 billion loss in tax revenues.

What does this have to do with the State of Hawaii? Well, in 1968, the State of Hawaii felt that its economy was being "squeezed" by an alleged price-fixing scheme where the price of gasoline was higher than it should be.

We complained that several major oil companies had unjustifiably extracted from the State's economy a certain determinable amount of money which curtailed opportunities in manufactuing, shipping, and commerce, placing our State at a competitive disadvantage with other States, and which did general damage to our economy.

In others words, the State of Hawaii had its own oil crisis long before the most recent national crisis. In our situation in 1968, the oil producing nations were three major oil companies which, as alleged, subtracted small sums of money from each consumer—making consumer suits impractical—but large amounts in the aggregate.

This was extremely harmful because, one, the State of Hawaii is almost totally dependent on oil for its energy since we lack ready access to coal and we do not have significant amounts of hydroelectric power and, two, these oil companies were foreign corporations which spent little of their alleged ill-gotten gain within our State.

Assuming these companies were subtracting $100 to $200 per person, we can readily see that within our insular economy, a minirecession took place where there were fewer jobs and industries.

Of course, I have oversimplified the situation, but assuming the theory and effects are somewhat accurately stated, then the meaning of antitrust violations have day-to-day consequences for the man in the street and for State governments.

Your respective State's citizens may suffer as our Nation has suffered through these past troubled times in our Nation's economy. More people may be out of work there than should be.

There may be less industrial production and investment than there should be. The tax base of State and local governments may erode as many people become unemployed. People on welfare mean expenditure of State time and money.

Essential State economic programs may go unattended or be thwarted entirely.

We, in Hawaii, have long sought to diversify our industries which are hard to encourage in recession-like atmosphere. In sum, we believe an economy can suffer damage which should be compensated for.

As a final note, we live in times where corporations have become larger than States, indeed, larger than nations. Each of our lives is intruded upon by corporations which artificially tinker with our free enterprise system. Pricing systems may be manipulated by political favors or by financial schemes. In each and every violation of our antitrust laws, not only our economy is affected, but the fabric of our society. The individual citizen faced with artificially induced high prices or unemployment resulting from high prices loses faith in our system of capitalism and in our system of government. Shrinkages in household budgets degrade the breadwinner and disadvantage the members of that household.

Basically, in conclusion, all we are interested in is for the States to be able to bring such parens patriae suits, and there is an adverse affect on the States' budgets whether it be less income or more expenditures because of antitrust violations.

Thank you very much.

For these reasons, the State of Hawaii recommends passage of Senate bill 1284.

Mr. MILLER. Senator, the next gentleman I would like to call on is the assistant attorney general of Alabama, William T. Stephens.

Senator HART. Mr. Stephens.

STATEMENT OF HON. WILLIAM T. STEPHENS, ASSISTANT ATTORNEY GENERAL OF ALABAMA, MONTGOMERY, ALA.

Mr. STEPHENS. Chairman Hart, Senator Hruska, I appreciate the opportunity to appear before you today to testify on behalf of the State of Alabama and Attorney General Bill Baxley in support of S. 1284, the Antitrust Improvement Act of 1975.

In particular, I would like to address my remarks to section 4 of that bill, the parens patriae provision,

The State of Alabama and Attorney General Bill Baxley do strongly support S. 1284, and urge this committee to give it a favorable recommendation.

As you know, similar legislation has been introduced in the House of Representatives, and we have expressed our support of that legislation, in principle, to Chairman Rodino and members of the House Judiciary Committee.

We believe that this bill, and the revisions it makes in the antitrust law, are long overdue. But it could not have come at a more appropriate time.

The increasing accumulation of capital, and centralization of economic power in fewer and fewer large corporations, has caused increasing concern among the people of this country.

The recent energy crisis, and increasingly difficult economic conditions today, have more forcefully than ever brought home to the American people the reality that the concentration of economic power can have extremely adverse effects on the individual citizen of this country.

Our citizens have increasingly felt that they are at the mercy of large corporations, and they have become increasingly aware that all of the freedoms upon which this country was founded, and for which we have fought for so many years, depends upon a large degree of economic freedom for our citizens.

Additionally, difficult economic times are more difficult for the smaller locally owned or individually owned business, and the danger of increased concentration is greater in such difficult economic periods. In so many cases, businesses are struggling to stay alive today. And in their struggles there is too often too little regard for the competitors, for others in the business community, and for the consumers. When a business is struggling to stay alive, business ethics are not a primary consideration.

Also, in the State of Alabama, as in numerous other States in this country, we are in the beginning stages of industrialization and commercialization.

Our State is still changing from an agrarian economy to an industrial, or commercial economy. There is still time for us to guide that change, and to assure that the resulting economy will be based upon principles of fair competition and fair services to the consumers of our State.

I believe that it is widely accepted now that the antitrust laws are a valuable weapon for our citizens, both consumers and businessmen, against the unfair and improper business activities of others.

However, a weapon is no good if there are no soldiers to operate it. And unfortunately, the antitrust army is seriously inadequate and unprepared. There are too few soldiers to utilize the weapon which Congress has provided for this battle.

Just as we must provide an army to deter and fight foreign aggression, we must provide forces to combat the enemy within: the economic aggressors; we must provide attorneys to protect our people against the abusers who would impose economic servitude and economic injustice upon our people.

Both the U.S. Justice Department, Antitrust Division, and the Federal Trade Commission have been vigilant, though often handicapped by lack of resources in this battle against economic aggression. However, they cannot do the job alone.

In the Southeastern part of the United States, for example, the U.S. Justice Department's Antitrust Division has only 8 to 11 attorneys to handle all the antitrust matters that arise in 8 to 10 Southern States.

I have met with Justice Department officials in their Atlanta office on more than one occasion to discuss cooperative efforts between the State of Alabama and the U.S. Justice Department in antitrust enforcement efforts. And they have welcomed our interest and offer of cooperation because, as they have stated, there are many antitrust violations which they simply cannot pursue for lack of manpower or resources.

They are forced to concentrate on a few cases of major significance, and are forced into impotency against the many minor or smaller violations, although the accumulated minor violations may have a significant, or even more significant, impact on our economy and on the citizens of our State than would a particular major violation.

The States, themselves, are virtually impotent against antitrust violators. We, of course, cannot now file actions on behalf of our citizens, and on behalf of the State to recover damages for antitrust violations under Federal antitrust laws. Nor in many cases do State laws provide a remedy for antitrust violations.

The State of Alabama has antitrust provisions in its law, but those provisions are woefully inadequate, and are, consequently, unused and ineffective as a deterrent.

Attempts to strengthen the State antitrust law have met with strong opposition from business groups, and such attempts have been unsuccessful.

The citizens are thus left to private lawsuits to protect them against antitrust violations, and to recover their damages for such violations.

But the average citizen in Alabama, and I believe the average citizen in this country, is not economically or legally sophisticated enough to recognize antitrust violations, although they justifiably recognize and believe that they are being "ripped off."

And being unaccustomed to, and uncomfortable with legal proceedings, most of them would never dream of filing an individual lawsuit, nor would they know how to go about doing so.

The class action permitted by rule 23 of the Federal Rules of Civil Procedure has helped this problem to some extent. However, class actions are also of limited utility.

They are brought, mainly, by professional class action plaintiff attorneys who are looking for big legal fees, and consequently, will file only large actions which may result in such fees for themselves.

They are not so concerned, and perhaps they cannot economically be concerned about violations which, although they may have a serious impact on the community and the consumers, would not result in a large monetary judgment with accompanying large legal fees.

Also, it remains to be seen what effect the Supreme Court's decision in the *Eisen* v. *Carlyle and Jacquelin* case will have on class action.

It has been widely speculated and believed that this decision, which would require plaintiffs to pay for the legal notice to the class required under the most prevalent type of class action, would effectively deter plaintiffs and attorneys from bringing most potential class actions.

The bill, S. 1284, would permit the States' attorneys general to represent the citizens, and economic interests of the political subdivisions of their States as they wish to do, and as the citizens of their States expect them to do.

Citizens look to their State attorney general to represent them in all types of legal matters, and expect their attorney general to protect them against larger forces against which they cannot protect themselves.

The attorney general of our State, Attorney General Bill Baxley, ran for that office with the promise that he would be the peoples' lawyer. And we firmly believe in that concept, and are firmly committed to being the peoples' lawyer. And the people in our State expect us to be just that.

In supporting S. 1284, we ask, only, that you permit us to do that; to represent our citizens in these antitrust actions.

It should be noted that S. 1284 does not place any increased burden or restrictions upon businessmen, nor does it define any new crime or

illegal activity. It merely permits those few persons who have been elected, or in some cases appointed, to represent the legal interests of the various States and their citizens against antitrust law violations.

The State attorneys general are responsible individuals who are accountable to the people of their States, and can be expected to exercise that right properly and not to abuse this right of action.

Those who would oppose the parens patriae provision of this bill on the grounds that it may proliferate litigation, are in reality, only acknowledging that under the provisions of this bill, those persons who would violate our antitrust laws would more likely be held accountable for those violations.

The passage of this bill will not, of course, immediately initiate active antitrust enforcement programs in each of the 50 States.

Most of the States, including Alabama, do not now have the present capabilities to conduct a large-scale antitrust enforcement program. A few States currently do have such capability and such programs. We must have a law to enforce before we can develop the expertise or the program. An active enforcement program can and will be developed.

In Alabama, for instance, we presently have two attorneys with considerable antitrust litigation experience, and we have the potential for developing an active antitrust enforcement program within the near future.

An ancillary beneficial effect of this bill might be to sensitize the citizens and the bars of the various States to antitrust issues, and to smooth the way for enactment of effective State legislation. Even the bar in our State is quite unsophisticated and uneducated about antitrust laws.

In summary and conclusion, I wish merely to emphasize that the State of Alabama stands ready to accept its responsibility for protecting our citizens against this type of economic injury.

We want to cooperate with and complement Federal enforcement efforts to achieve our mutual goal of protecting the citizens of our respective States and of this country.

We ask only that you permit us to be a partner in this effort, that you permit us to share this responsibility, and to contribute our unique abilities and talents to this effort.

Thank you for the opportunity.

Senator HART. Thank you.

Mr. MILLER. Next, I wish to call on Stephen Dunne, who is the chief counsel of the Antitrust Division in the State of Oregon.

STATEMENT OF STEPHEN DUNNE, CHIEF COUNSEL, ANTITRUST DIVISION, IN BEHALF OF LEE JOHNSON, ATTORNEY GENERAL, OREGON

Mr. DUNNE. Chairman Hart, Senator Hruska, and distinguished members of the subcommittee. I appreciate this opportunity to testify and direct my attention to title IV of S. 1284.

Attorney General Johnson regrets that he is not able to be here, and asked me to speak in his stead.

We support title IV of S. 1284. We think it is of great importance to the States to have two concepts in that bill codified for the purposes of more effective antitrust enforcement in the States.

Those two concepts are: One, the parens patriae standing issue for the States to recover damages for their citizens, and two, for the right to recover damages to the general economy of the State.

We are a small State—we have only 2 million residents in our State—we do have an antitrust division which we enforce ourselves. We are the only small State that does. I think the codification of these two concepts could effectively encourage other small States to develop programs like our own; and, consequently I think we would get more attorneys general involved in antitrust enforcement and become more antitrust minded.

We heartily support section 4(c) of the Clayton Act. The courts have, pretty clearly, said that we do not have standing for damages under a parens patriae concept. They have left it to the Congress to create this standing. This legislation is strongly needed.

We very strongly support the actions for damages to the general economy of a State. In *Hawaii* v. *Standard Oil*—this concept was rejected by our supreme court and, again, this was left to our congress to create.

At first blush, section 4(c)(a)(2), which is the provision that allows for damages to the general economy, may seem like a wide open avenue for windfall recovery, and thus, there would be serious objections from various segments of the industry.

It is our view, however, that recovery on these grounds would not be a windfall, but, rather, would require very clear and explicit proof by the State, probably through the use of expert econcmic testimony.

There are certain types of antitrust violations which can have a very detrimental effect on a State's economy and its citizens. For example, it has been alleged by some that the gasoline shortage last year was the result of illegal collusion by members of the oil industry. We wish to make it clear that we do not, and are not, making an allegation that this is, in fact, true. But if it were true, there is little question that the gasoline shortage had a great effect on the Oregon economy. One of our largest industries is the tourist industry in Oregon, particularly from California, and many tourists were discouraged from coming to the State of Oregon because of the high price of gasoline. That this had a measurable effect on our economy could not be doubted and could easily be measured by an economist.

Section 4(d) creates some considerable problems for the U.S. attorneys general. We do not feel that the Attorney General of the United States should be burdened with this responsibility. Assistant Attorney General Kauper has testified against this provision of the bill in speaking for the administration, and industry is certainly opposed to it. We see no need to have section 4(d) in the bill.

Section 4(e), to a large degree, could probably be eliminated. We had an experience, recently, in Oregon, where we were in litigation in the *Western Liquid Asphalt* cases and the trial judge clearly told us in a Federal funding situation, that even though the Federal Government was not present in the litigation, we would not be able to recover for the amount of Federal contribution in the litigation.

We think it important to codify the concept that the States, if the Federal Government is not present in litigation, be allowed to collect the entire amount in the Federal funding program, so that the industry or the defendant in the particular litigation would not get away

scot-free. The amount of Federal contribution in a number of these programs, as we are all aware, is often substantial.

Thus we do think it is important to codify the first sentence in section 4e, page 23 of the bill and then skip to the last word on line 25, which starts with "if the United States brings a separate action for the damages sustained," and continue to the end of the section. The difficulty with the middle part of that section is that the Attorney General of the United States could be burdened with enforcing States rights. He has, at the present time, the right to intervene and represent the United States in any action under 4(a). The addition of this part of section 4(e) would be superfluous.

In closing, again let me say that we do strongly support the motives behind this bill and the passage of this bill because of the two embodied concepts that are very important to antitrust enforcement and the maintenance of free economy in this country. Parens Patriae standing for States in private damage actions, and actions for damages to a State's general economy would greatly facilitate that enforcement effort.

Thank you.

Senator HART. Thank you.

Mr. MILLER. Senator, the next gentleman I would like to call on is Peter Shack, who is deputy attorney general of the State of California.

STATEMENT OF HON. PETER K. SHACK, DEPUTY ATTORNEY GENERAL ON BEHALF OF ATTORNEY GENERAL EVELLE J. YOUNGER OF CALIFORNIA, LOS ANGELES, CALIF.

Mr. SHACK. Mr. Chairman and Senator Hruska, first of all, Attorney General Younger wanted me to thank you, Mr. Chairman, for your kind invitation for him to appear here today. Unfortunately, his schedule did not permit that and he regrets it very much.

We have previously submitted a prepared statement [1] for Mr. Younger to the Committee in which we comprehensively discuss title IV, Parens Patriae, and make comments on the other titles of the bill.

Since this is rather lengthy, I will make brief oral remarks based primarily on the written testimony.

As you have heard from the previous witnesses, title IV, the parens patriae amendments to the Clayton Act, would fill a glaring gap in the antitrust laws. Since California's activity in antitrust includes both enforcement of State law and suits under Federal law, we have realized that the present scheme for deterring violations is far from perfect.

The recent change in criminal penalties for Federal violations is an important step and we hope to have enacted similar provisions in California this year.

The deterrent effect of Clayton Act actions has, however, encountered a judicial barrier, and title IV will remove that barrier.

The parens patriae course of action will certainly not be new—in California it's instituted vigorously. We have included such a cause of action in antitrust cases involving plumbing fixtures, ampicillin, motor vehicle air pollution devices, drugs, antibiotics, and snack foods. In our belief, parens patriae is vital as an effective deterrent to antitrust violations aimed at consumers.

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[1] See p. 266.

The type of situation we were faced with in *California* v. *Frito-Lay* illustrates this. Let's say you have a price fix on potato chips where there are a great many manufacturers in the country involved.

We recognized that if liability were found, individual consumers might well be compelled to prove their damages, and only a small percent of them would do so. The problem is, that with low-cost consumer goods, hardly anyone keeps receipts.

In any event the individual consumer can't bring his own action as a practical matter for his pennies' worth of damage. A class action is only a partial answer. Of course, there is the requirement of the *Eisen* case to contend with. But aside from those and other possible problems, once liability is found, the issues become proof of the amount of damages, and the distribution of damages.

If the courts are going to compel the proof of damages through the existence of receipts, which is always contended by the defense bar, the defendants who have already been proven liable, will retain most of their illegal profits, and there is no deterrence in this.

Judge Real, who was the trial judge in the *Frito-Lay* case, originally upheld the parens patriae cause of action. And I think he pretty well summed up what the intent of title IV would be. I will quote briefly from Judge Real's opinion:

> What corporation would not risk violation of the antitrust laws where maximum penalties are miniseule compared to the potential harm to the public unable to meet "technical" requirements of proof of damage? Or, even more to the point, what corporation would risk violation of the antitrust laws if they were assured every penny of conspiratorial gain, three times over, were the ultimate result of the proven price-fixing conspiracy? Putting the question, it's own obvious answer.

That's the end of Judge Real's quotation.

As the 9th Circuit in *Frito-Lay* determined, the answer to this problem lies in new legislation. The attorney general of California wholeheartedly supports the concept of title IV. In approximately the last 8 years, we have recovered about $55 million of antitrust damages, much of which has gone to consumers in our State and almost the entire remainder to governmental entities. This has been at a cost of about $2½ million. We are proud of that; but we want to, and are, able to do more.

We feel that this legislation is essential for two basic reasons. First, it insures the Federal antitrust enforcement efforts are effectively supplemented by Clayton Act litigation. And second, as States continue to become more active in antitrust, they are becoming an important factor in our overall national antitrust policy.

This legislation would enable States to play their full role in the comprehensive enforcement effort. Mr. Chairman, that concludes my statement. I want to thank you for the privilege and opportunity to appear here today.

[The prepared statement of Attorney General Evelle J. Younger follows:]

STATEMENT OF CALIFORNIA ATTORNEY GENERAL EVELLE J. YOUNGER, RE S. 1284, BEFORE THE U.S. SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON ANTITRUST AND MONOPOLY, JUNE 3, 1975

The Antitrust Improvements Act of 1975, S. 1284 is of extreme importance to state attorneys general. California has one of the largest and most active state antitrust units in the country, and as such our comments are directed to various titles of this comprehensive bill. We are, of course, most directly concerned with

Title IV, the Parens Patriae amendments to the Clayton Act. Our initial remarks are, therefore, addressed to that title.

In recent years, state Attorneys General, acting on behalf of their citizens, have shown increasing interest and capability in initiating lawsuits seeking damages and injunctive relief for violations of the antitrust laws. When suing in their proprietary capacities states have not encountered procedural difficulties. There is no question, for example, that a state can recover as damages overpayments for purchases it made as a result of a price-fixing conspiracy. When states have attempted to broaden these lawsuits, however, they have too often encountered a judicial barrier. California has been keenly interested in the *parens patriae* issue. We have filed an *amicus curiae* brief in the United States Court of Appeals for the Ninth Circuit in *Hawaii* v. *Standard Oil Co. of California*. Our complaints in the plumbing fixtures, motor vehicle air pollution, ampicillin, broad spectrum antibiotics, and snack foods litigation have included *parens patriae* causes of action. In the latter case we petitioned for a writ of *certiorari* in the Supreme Court. Innovative efforts to obtain otherwise unrecoverable illegal profits retained by an antitrust violator have been thwarted by judicial interpretation of the present antitrust scheme. It is this unfortunate stiuation that Title IV seeks to rectify.

As with similar legislation pending before the full House Judiciary Committee, H.R. 6786, Title IV of S. 1284 would restore to state Attorneys General their common law powers to act as *parens patriae* on behalf of their citizens, power that has recently been eroded by court decision. Before discussing those decisions, the consequent need for remedial legislation, and the bill itself, it would be helpful to explore the origins and development of *parens patriae*.

In early English common law, idiots, incompetents and infants were *non sui juris*, unable to represent themselves. As the feudal system developed, the King retained certain powers and duties, known as the "royal prerogative," and the legal doctrine of *parens patriae* (literally "father of the country") was developed. This doctrine provided that the King, through his attorney general, could represent all persons *non sui juris*. See *Attorney General* v. *Dublin* (*Mayor of*), 1 Bligh N.S. 312 (1827), 4 Eng. Rep. 888 (1901); *Shaftsburg* (*Earl of*) v. *Shaftsburg*, Gilb, Rep. 172 (1725), 25 Eng. Rep. 121 (1903). For example, Blackstone refers to the King or his representative as "the general guardian of all infants, idiots and lunatics," and as the superintendent of "all charitable uses in the kingdom." 3 W. Blackstone, Commentaries 47–48 (E. Christian, ed. 1794). "In the United States, the 'royal prerogative' and the 'parens patriae' function of the King passed to the States." *Hawaii* v. *Standard Oil Company of California*, 405 U.S. 251, 257 (1972).

The nature and scope of *parens patriae* has been greatly expanded in this country beyond its original common law confines. This expansion is reflected in a line of cases developed in the early nineteen-hundreds wherein States made use of the doctrine to obtain relief from such problems as air and water pollution and diversion of waters.[1] The nexus in all these cases is that a large number of a state's citizens were injured—or threatened with injury—and the injured mass of citizens was unable to protect its own interests because of the magnitude of the problem. Such suits were permitted even though the persons represented were not technically *non sui juris*, and even though there was no direct injury to any proprietary interest of the state.

The Supreme Court had occasion to consider the applicability of *parens patriae* to relief from antitrust violations in *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945). There, the state sougnt to invoke the original jurisdictionıof the Court to remedy a conspiracy by several railroads to fix rates on the transportation of goods to and from Georgia. In discussing the propriety of suing *parens patriae* under the antitrust laws, the Supreme Court stated:

"[W]e find no indication that when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. Suits by a State, parens patriae, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts." *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. at 447.

Georgia was allowed to file its complaint seeking both damages and injunctive relief. She was in fact denied damages, but only because such recovery might be an illegal rebate, as the railroads' rates had been approved by the Interstate Commerce Commission.

Over the years, then, the judicial eye has looked favorably on the doctrine of *parens patriae*. From the sovereign representing the individual incompetent, it developed to the point that states could represent their citizens and presumably

[1] *See, e.g., Missouri* v. *Illinois*, 180 U.S. 208 (1901); *Kansas* v. *Colorado*, 206 U.S. 46 (1907); *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907); *New York* v. *New Jersey*, 256 U.S. (1921).

protect their economies injured by violations of the antitrust law. It was quite a blow, therefore, when two recent decisions clouded prospects foi the future use of the doctrine in the antitrust context.

The first case was *Hawaii* v. *Standard Oil Co. of California,* 405 U.S. 251 (1972). There, Hawaii sought treble damage recovery for injury to its general economy allegedly attributable to a violation of the antitrust laws. The Supreme Court, in reversing the trial court, held that such an injury was not compensable under § 4 of the Clayton Act, 15 U.S.C. § 15. Although the Court did not expressly foreclose future use of the *parens patriae* doctrine, by deciding that injury to a state's general economy was not an injury to its "business or property," a requirement of § 4, the ability of a state to recover antitrust damages by itself or as a class representative was severely limited.

In the wake of *Hawaii* came *California* v. *Frito-Lay, Inc.,* 474 F. 2d 774 (9th Cir, 1973), *cert. denied,* 412 U.S. 908 (1973). California alleged a conspiracy to fix and maintain prices of snack foods in violation of the Sherman Act, 15 U.S.C. § 1. We sued in our capacity as purchaser, as class representative, and as *parens patriae* representative of all California consumers. The District Court, as in *Hawaii,* denied defendants' motion to dismiss the *parens patriae* cause of action. The United States Court of Appeals for the Ninth Circuit disagreed. It recognized that it was faced with a completely different question than that presented in *Hawaii.* Recovery was sought for injury to California's citizen-consumers, not for injury to its general economy. Although the Court admitted this "may be a worthy state aim," it held that to permit this application of common law *parens patriae* would ignore the safeguards that have been developed in rule and legislation concerning class actions. The Court of Appeals said that:

"The state most persuasively argues that it is essential that this sort of proceeding be made available if antitrust violations of the sort here alleged are to be rendered unprofitable and deterred. It would indeed appear that the state is on the track of a suitable answer (perhaps the most suitable yet proposed) to problems bearing on anti-trust deterrence and the class action as a means of consumer protection. We disclaim any intent to discourage the state in its search for a solution.

"However, if the state is to be empowered to act in the fashion here sought we feel that *authority must come not through judicial improvisation but by legislation and rule making. . . .*" 474 F. 2d at 777. (*Emphasis* added).

The legislation under consideration today would give the Ninth Circuit the authority it was looking for. It would fill an important gap in the enforcement of the antitrust laws. A closer look at the facts and circumstances of the snack food case reveals an all too common state of affairs and clearly demonstrates the need for this legislation.

California had evidence that the price of potato chips, corn chips and similar products was illegally fixed pursuant to a conspiracy by a great many manufacturers. Potato chips are usually sold in small quantities and at low prices. Unlike the purchase of an automobile, or even a few gallons of gasoline, the consumer would seldom, if ever, keep a receipt of the purchase of potato chips. Indeed, in the case of snack foods the purchases are often made by children. Whenever these ingredients are present—low cost consumer products, whose price is affected by an antitrust violation, purchased in small quantities by consumers who seldom keep receipts—the violators, in the absence of a *parens patriae* cause of action, are rewarded with large profits without fear of punishment.

It is apparent that the individual consumer will be hard-pressed to bring his own antitrust suit even in the unlikely event he could prove his pennyworth of damage. The time and expense involved in antitrust litigation is well known.

The Supreme Court in *Hawaii* and the Ninth Circuit in *Frito-Lay* suggested that class actions provide the solution to the consumers' dilemma. Section 4C(a)(1) of this bill reaffirms this alternative and may establish *prima facie* that a State attorney general is the proper class representative. At best, however, a class action is only a partial solution. Practically speaking, the amount of claims proven by class members will be small compared to the total damages inflicted by antitrust violators upon consumers and compared with the illegal profits they obtained. To the extent that millions of class members cannot or will not prove their claims the violators will retain their illegal profits. They will have committed the "perfect crime."

Violations of the antitrust laws are difficult enough to detect. With this type of "white collar crime" there are no fingerprints or dead bodies. Violators are usually sophisticated. They conceal their transgressions in a web of complex business transactions and relationships to be discovered, if at all, somewhere within the

reams of documents they neglected to destroy. Once evidence of a violation is obtained and proven, often after years of investigation and legal maneuvering, it is unthinkable that the antitrust law permits the perpetrator to keep a large part of ill-gotten gains.

Title IV of S. 1284, if passed, would go a long way toward a remedy of this situation. It would amend § 4 of the Clayton Act to specifically permit a state Attorney General acting *parens patriae* to recover treble damages on behalf of his citizens, political subdivisions, or for injury to the state's econlomy. It would, in effect, overrule *Hawaii* and *Frito-Lay*. In addition, it would clarify and legitimize the so-called "fluid class recovery," thereby insuring that violators completely disgorge their booty. There are, however, some portions of the bill which in our opinion require clarification.

First, Section 4C(a)(1) as drafted would empower the state Attornely General to represent his citizens either as *parens patriae*, or, alternatively, as class representative. These two types of representative lawsuits should not be mutually exclusive. Procedures that have been developed under the class action rules are useful and necessary, but as has already been mentioned, do not provide for complete recovery of illegally obtained profits. As California envisioned in *Frito-Lay*, *parens patriae* recovery may begin when class action recovery ends. In other words, *parens patriae* can be used in its "pure" form, or as a supplement to a class action depending on the facts of a particular case and a determination by the trial court as to which procedure is the most appropriate for that case. In the latter instance, as a class action supplement, *parens patriae* will insure complete recovery by the state for its citizens, who cannot or do not prove their claims as class members. We therefore disagree with the Department of Justice and recommend that Section 4C(a)(1) be amended to permit a state Attorney General the flexibility of bringing both *parens patriae and* class actions concurrently in the proper case.

Second, Section 4D obligates the Attorney General of the United States, whenever he has brought an action under the Clayton Act and has reason to believe that a state attorney general would be entitled to bring a substantially similar action, to notify the state attorney general. The notification provision is commendable and, we believe, not unduly burdensome on the Department of Justice. The Department's Antitrust Division has for many years publicly encouraged federal-state cooperation in antitrust enforcement. In fact, we suggest that Section 4D be amended to require similar notice whenever the Department has brought a civil action under any of the antitrust laws, not just the Clayton Act.

As for the remainder of Section 4D, California believes the provisions are not desireable and is in agreement with the Department of Justice on this point. A provision authorizing *parens patriae* actions on behalf of citizens of a state by the federal government, whether mandatory or permissive, may not encourage greater state antitrust involvement, a goal of Title IV. Unlike California, some states which have not had active antitrust programs might tend to defer to the Department of Justice. Furthermore, the ninety-day period during which a state attorney general must decide whether or not to bring an action is somewhat unrealistic. Antitrust cases are expensive to conduct and are the most complex and time consuming litigation before the federal courts. Many states may wish to await the filing of a bill of particulars by the federal government, the completion of discovery, or even the completion of a federal criminal or civil action before determining whether to enter into antitrust litigation. Decisions regarding filing of such litigation must be carefully considered. We therefore recommend deletion of subsections (b) through (d) of Section 4D, and references thereto in Section 4E.

Third, Section 4E indicates that under federally funded state programs affected by antitrust violations, the United States shall be entitled to secure reimbursement of its "equitable share" of any recovery. The state would be entitled to treble damages. It is unclear from the bill whether the United States equitable share of the recovery would likewise be trebled. An "equitable share" would seem to contemplate that the United States receive reimbursement of the proportionate amount actually spent in the federally funded program, with the states retaining the remaining damages, trebled. We feel it would be desirable to clarify this point.

Apart from these specific points which we feel require clarification or change, we again would emphasize our hearty endorsement of the concepts of Title IV. State Attorneys' General can provide a vital supplement to the Departm nt of Justice's Antitrust Division and the Federal Trade Commission in the enforcement of the antitrust laws. The bill would provide a unique opportunity for balanced and more complete law enforcement by encouraging greater state innovation and participation. It would achieve important new protection for consumers

and stronger deterrence to antitrust violators. Attorney General Younger anxiously awaits this authority to act on behalf of California citizens *parens patriae*.

Although the other Titles of S. 1284 do not directly relate to activities of state attorneys general, there are certain provisions about which California has suggestions or comments. For example, Title II substantially increases the scope of Department of Justice CID's (Civil Investigative Demands) by including protective conduct and individuals as targets of inquiry. CID coverage would be expanded to include interrogatories and depositions. Title VI changes the effect of nolo contendere pleas. States suing either in their proprietary capacity, as class representatives or as *parens patriae* would receive the benefit of prima facie evidence of an antitrust violation in preparing and proving their civil cases. The prima facie effect extends at present only to guilty pleas or convictions.

The Department of Justice is in favor of Title II and opposed to Title VI. They believe that changing the consequences of a nolo plea will hamper their efforts by forcing them to try more criminal cases. We are inclined to agree with the Department. The deterrent effect of treble damage actions, which would be enhanced by *parens patriae* representation, would not be changed substantially by Title VI. In our view, what state attorneys general and other private plaintiffs require is greater access to the product of expanded federal Civil Investigative Demands *and* grand jury material. States especially, as active partners with the federal government in antitrust enforcement, should be privy to this information.

At present, CID material is not available at all. Grand Jury documents and transcripts are available only on a showing of particularized need, over the strenuous objections of defendants and, in our experience, with the limited cooperation of the Department of Justice. We believe an amendment to provide for this greater access is highly desirable, and stand ready to work with the Subcommittee in developing such an amendment.

Title III puts teeth into penalties for failure to comply with FTC Special orders or subpoenas. We support this provision.

The premerger notification provisions of Title V would require notice to the FTC and the Department of Justice before further concentration of industry occurs. This seems a reasonable approach to a serious problem. Although mergers and industrial concentration are certainly not economic evils per se, the federal government's antitrust enforcement branches should be able to scrutinize potential problems in this area before the fact.

Finally, we strongly endorse the amendments offered by Senator Bayh. The provisions allowing civil penalties for antitrust violations is particularly welcome. California statutes allow civil penalties for violations of our state antitrust laws.[1] In our experience, the availability of this relief gives us needed flexibility in enforcing the law. Quite often civil penalties seem to be *the* remedy of choice. The federal government should also be provided with this important option.

Senator HART. Now, General Miller, as chairman of the antitrust committee of the national association, and speaking as the attorney general of Virginia, we would welcome your comments.

STATEMENT OF HON. ANDREW P. MILLER, ATTORNEY GENERAL OF VIRGINIA, CHAIRMAN OF ANTITRUST COMMITTEE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. MILLER. Thank you very much, Mr. Chairman. Before I commence in my remarks, I would like to have filed in the record a letter[2] addressed to you, sir, from Attorney General John C. Danforth of Missouri. A copy of that letter was sent to me, and he personally requested that I make sure that it was filed in the record of this proceeding.

Senator HART. It will be printed in the record as will your prepared statement.[3]

I note, before you start, that there is a fairly effective discipline, at least among the States that have testified thus far. They seem to

[2] See p. 684.
[3] See p. 286.
[3] *e.g.*, California Civil Code, Section 3370.1; California Business and Professions Code, Section 21140.3.

respond to your basic point of view with respect to this bill, step by step.

Was there—literally—any disagreement as you went down the list?

Mr. MILLER. No, sir. I don't think there was. Being chairman of the antitrust committee is sometimes a tough job. I will not suggest to the Chair that, in fact, there have not been discussions as to various points in the bill—as to how it should be phrased.

But as to the basic thrust of the bill, the antitrust committee of the national association, and the national association, itself, supports the bill in principle. This is the action that has been taken by the association.

In that regard, I understand there has been some suggestion, perhaps to the committee staff, and perhaps to committee members, that in fact the action of the national association should be regarded simply as that of another trade association.

I think that is rather extraordinary in light of the reason you have just suggested. The miracle of Philadelphia is something which is constantly reoccurring when States get together in matters of this sort, despite the diversity of viewpoint among some 50 States.

As a consequence of the efforts of the national association through its committee, the attorneys general in recent years have taken very vigorous action on a number of fronts. The antitrust field is one of them. And for that reason, I am pleased to have the opportunity today to represent the National Association of Attorneys General.

Each of the representatives from various attorneys general offices, as well as the attorneys general who are here, obviously are speaking for their individual States. But nonetheless, those States do have a common point of view with respect to this legislation.

Senator HART. I think that should be persuasive with Members of the Congress.

Mr. MILLER. I would hope it would be, sir.

I would like to address my comments to two titles of S. 1284, title IV, the parens patriae provision, and title VI, the nolo contendere provision. At the outset it is very clear that in the last several years, the offices of attorneys general around this country have spent an increasing amount of their time, manpower, and financial resources in the antitrust field.

As the Chair is aware, I appeared on behalf of the national association before the House Judiciary Committee when it was considering H.R. 12528. And, of course, the provisions of that bill are very similar to the provisions of title IV of S. 1284.

As you are also aware, H.R. 12528 was reintroduced as H.R. 38, and is now pending before that committee as H.R. 6786. I am gratified that most, if not all, of the suggestions made by the association with respect to H.R. 12528 have been adopted in the draft of S. 1284.

My testimony today, will be limited, therefore, to those provisions of S. 1284 that have been commented upon adversely. I will (1) demonstrate the necessity for the thrust of the bill, and (2) suggest some possible amendments, which would strengthen its purpose.

In this regard, I would support first, the exclusion of corporations from the concept of parens patriae. When I discussed this matter

with the House Judiciary Committee, the original word used in the bill was "citizens." It was felt that in the context of antitrust enforcement, "citizens" did not have sufficient specificity. Consequently the language was amended to "persons." But I also see some difficulty with the use of the word "persons." Consequently, I would propose an amendment to the bill substituting the phrase "natural persons" for the word "persons."

This revision would remove any complexities in litigation involving the different levels of the distribution chain. I would also appropriately limit parens patriae actions to those who would be most directly benefited, and of necessity should be benefited, individual consumers who do not normally have the records reflecting their purchases, nor house counsel to represent them in pursuing such action.

Second, there has been some comment with respect to inadequate notice. In that respect I would urge the committee to consider amending section 4B(1) to incorporate the notice provisions of rule 23.

This would resolve—in fact, eliminate, from the constitutional standpoint—any question whatsoever of lack of due process in the notification procedures which might, in fact, be pursued in a parens patriae action brought pursuant to this bill.

As a practical matter, due to the type of consumer actions brought by the States, the notice of requirements would not be unduly expensive or burdensome. I am sure that the *Eisen* case will be mentioned later in the afternoon. There, Mr. Chairman, a different situation existed from that which arises in the type cases which States bring. In *Eisen* there existed a list of the individuals actually involved.

In those circumstances, when a question arises as to the best practical notice, you know precisely who is affected. When however, you are talking about a conspiracy, for instance, in the bread industry, you do not have a list of every consumer who buys bread. Consequently, under those facts, individual notice would be impractical and would not be legally required, because there is no list available. Notice by way of a publication, in such instances, frequently would represent, therefore, the best practical notice.

But what type of notice should be given? I think this should be left to the discretion of the judge handling the specific cases, allowing interpretations in accordance with rule 23(C)(2) and its flexibility.

Third, I would note agreement with the Department of Justice, as Mr. Kauper stated in his testimony on S. 1284, that the consumer remedy provided by the bill should not be diluted by permitting courts to adopt a class action procedure in lieu of the parens patriae concept.

I refer, in this regard, specifically to section 4C(a)(1). I think by limiting that section to parens patriae, coupled with the strengthening of the notice provisions, which I have mentioned, concerns about possible dilution of the effect of this provision would be removed.

Therefore, the Department of Justice, and the State attorneys general are in agreement in this regard. The appropriate amendment in this regard would be to delete the language on line 14, page 19, of the bill commencing "or alternatively", and running through "who have been damaged."

The next point I want to make is that I do not think that, as some have suggested, it would be desirable to remove the language in

section 4C(a)(3) relating to State suits on behalf of political subdivisions. It ought to be clarified, however, that I do not regard the parens patriae concept as applicable to political subdivisions. There is no need for it being so applicable.

Consequently, section 4C(a)(3) should be amended, as we suggested to the House Judiciary Committee, to provide that suit may be filed by a State as a "representative of a class" on behalf of any and all political subdivisions.

The reason for this, Mr. Chairman, is to make clear in the antitrust law that a State can represent political subdivisions as members of a class. This would guard against an aberational judge deciding that a State could not sue on behalf of itself, and its political subdivisions as members of the same class.

The next point deals with an amendment to section 4C(a)(2), relating to measurement and distribution of damages. The concept of damages to the general economy has caused some adverse comment. I do not believe, however, that such comments are justified. Quite the contrary, any difficulties in quantifying damages should be left to the trier of fact and not prohibited as a matter of law.

We are not concerned here with an attempt to quantify damages due to lack of buying power caused by an antitrust violation which exacted a toll from consumers' pocketbooks. Instead the thrust of such a provision properly relates to the economy of the State as a whole. In that respect, I would like to cite a case brought by the Commonwealth of Virginia in 1972, which I think illustrates the distinction I am drawing.

In that case the Commonwealth of Virginia attempted to bring an antitrust suit in the Supreme Court of the United States against certain airlines relating to the effect of their ratemaking policies as to Dulles Airport. The problem was that individual manufacturers of goods, within reasonable driving distances of Dulles Airport, who wished to ship their products overseas, would, due to adverse rate schedules, find it more economic to transport their products by truck to Kennedy, in New York, and fly it overseas rather than ship it directly out of Dulles.

Now, assuming that such activity was not protected by a regulatory agency, which is another point in the case and not relevant here—the agency in question, of course, being the Civil Aeronautics Board—it is clear that the economy of Virginia was damaged as a result. I would, therefore, strongly urge that a provision for general damages to the general economy remain in S. 1284 with specific guidelines as to measurement of damages. In that regard, I think it would be helpful to amend the present language of the bill, specifically 4C(a)(2), to read as follows—this proposal is similar to one which is being made, I notice, in the prepared testimony of David I. Shapiro[1] and attached as an appendix to his testimony. It would read as follows:

> As parens patriae with respect to any injury to the general economy of such State, or a political subdivision thereof, as measured by any decrease in revenues or any increase in expenditures, or both, of such State or political subdivision sustained by any reason of any violation of the antitrust laws, except that such damages shall not be duplicative of any damages recovered under paragraph one.

Now, this language serves the purpose, of course, of requiring that there be no duplication of recoveries. But it also sets forth precisely

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[1] See p. 345, paragraph (2).

what the basis is for recovery on the part of the State. And that is a decrease in the State's revenues or an increase in expenditures, or both.

Consequently, I think, having so clearly defined what the thrust of such an action would be, that the objections which have been raised, to the extent that they are pursued, would no longer have merit.

It also seems to me, Mr. Chairman, that the committee might wish to consider the language of 4(c) to the extent that the phrase, "political subdivisions" is included in that paragraph. I see no reason why political subdivisions should not be required to prove their precise damages. Their status really is no different from that of a corporation, which has sustained violation as a consequence of antitrust violation.

They are, indeed, municipal corporations in many instances. But in any event, I think that the provisions of section 4(c) should be limited to natural persons; that is, the consumer class, which a proceeding brought pursuant to 4(a)(1) would be directed toward, in terms of achieving an ultimate benefit.

The remaining provisions of S. 1284, title IV are still supported in concept. Other than those provisions, proposed sections 4(d) and 4(e), which allow the Attorney General of the United States to sue on behalf of individual States.

I have attached to my testimony here today, a copy of my testimony before the House Judiciary Committee[1] with respect to this same issue. I reiterate those comments. The Department of Justice, I know, shares those views with respect to section 4(D).

Very briefly, it seems obvious that the inclusion of such a provision would actually constitute a disincentive to States to formulate an effective antitrust program of their own. We all recognize the State budgetary process. If, in fact, a particular enforcement activity can be carried out at some other level of government then that activity is not going to be given as high a priority as some other matters which are also present. Consequently, it seems clear to me that the States should be provided with a mechanism, through this bill, whereby they would enhance their antitrust programs, as has been reflected in some of the comments made by the gentleman who preceded me.

States, however, should not be faced with the proposition that if they did not take action within a limited period of time, then, in fact, action would be filed in the name of the State by the Attorney General of the United States.

Another problem that the provision raises, of course, is the fact that you are talking about a 90-day period. The first notice that a State attorney general might have of the existence of the violation however, could well be receipt of the notification from the Attorney General of the United States.

Anyone knowledgeable in antitrust law recognizes that there is simply no way, in many instances, to prepare a case for filing within such a period of time. A "90-day" provision would result, therefore, in two things happening: suits being filed which, on full investigation should not have been filed; or on the other hand, an abdication of responsibility by the State to the Federal Government. Neither is desirable from the standpoint of public policy. The decision whether a State should be a party plaintiff to litigation, in my view, must con-

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[1] See p. 288.

stitutionally repose with its chief legal officer, rather than with some Federal functionary acting in a discretionary capacity.

I think that if this bill is adopted in its present form, that there are a number of attorneys general, myself included, who would question its constitutionality the first time that an Attorney General of the United States undertook to sue on behalf of a State, as a consequence to the provision as it now reads.

I wish now to turn, for a moment, to title VI. Let me mention here that I concur with the remarks made by the Department of Justice and others that there is no need for a change in status of nolo pleas. Rather than approach this subject by giving nolo pleas prima facie effect, I would rather see adopted a provision making the fruits of the Government's investigation available to other governmental litigants, whenever such a litigant is a State.

I understand that others have made comment, that the fruits of a Federal investigation is a Federal preserve. I find that extraordinary, in light of the fact that the fruits of that investigation were paid for by tax dollars from citizens of the several States of this country and, consequently, a Federal effort of that sort clearly should be made available to the States, with respect to their enforcement effort.

Now, the Department of Justice and the Federal Trade Commission currently have a complementary policy of granting access, on a confidential basis, to data and information secured through an investigation. The Department of Justice, however, has refused to implement such a policy where the States are concerned. I regard this as a very serious matter. And because, unjustifiably, in my view, the antitrust division has considered the States as mere private litigants, ignoring the reality that the States, in many instances, seek to recoup moneys which have ultimately been paid by the taxpayers, it is time to change this policy. And since no modification has occurred, on a voluntary basis, a legislative command to this effect would be clearly appropriate.

Limiting such a legislative command to those instances where the State was suing for damages sustained as a result of purchases made by it, would in no way disrupt any rule regarding grand jury secrecies. The underlying rule of grand jury secrecy has undergone considerable evolution since the *Procter & Gamble* case.

As you recall, in *Dennis*, the Supreme Court observed that, in general, the Court has confirmed a trial court's power under rule 6–E of the Federal Rules of Criminal Procedure, to direct disclosure of grand jury testimony preliminarily to, or in connection with, a judicial proceeding.

The court acknowledged that after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it. And disclosure, with whatever limitations on confidentiality appear to be desirable, rather than suppression of relevant materials, clearly promotes the administration of justice, particularly when taxpayers' dollars would be recouped.

Now, as I close, Mr. Chairman, as chairman of the Antitrust Committee, I just obtained a copy of one of the subsequent witness' testimony, that of Milton Handler. I find some extraordinary language which I would like the leave of the Chair to respond to at this time, since I will not have another opportunity.

Mr. Handler, with all respect to his professional credentials, has engaged in an extraordinary act of testimony, in raising questions and then not providing the answers. He attempts to discredit the antitrust efforts of the States.

He starts at 15 [1] by saying: "It is because the State attorneys general possess any special antitrust expertise?"

I think it is very clear that a substantial number of offices of State attorneys general do possess expertise in the antitrust area, and that the number of offices which do possess that expertise is, in fact, increasing markedly. Certainly, the antitrust programs of such States as Illinois, California, Wisconsin, North Carolina, and others, have had a very impressive record in recent years.

The next question: "Is it because they have greater skills than the Federal enforcement officials or the private bar?" I say in an increasing number of instances, the offices of State attorneys general have equal skills to those possessed by the Federal enforcement officers or any member of the private bar.

There are some other rhetorical questions raised—as: How many of the State attorneys general have ever tried a Sherman antitrust case? How many members of their staffs have had any antitrust experience?" I would be delighted to provide the committee with statistics if the committee would like to have that material.

But, it is very clear, from Mr. Handler's presentation, that he is attempting to put the States in the role of being pygmies in the antitrust field. That is the most unfortunate characterization. "What is their track record with respect to enforcement of their own State antitrust laws?" A very significant track record has developed in recent years. "What success have they had, up to date, in suing under the Federal antitrust laws?" We can provide a long list of cases. "Why,"—and I would like to respond to this—"if the State enforcement officers have anything to contribute to Federal antitrust litigation, do so many States hire private counsel to sue in their behalf?" The reason that a number of States hire private counsel to sue on their behalf is the fact that when you have an antitrust conspiracy, which is confined to the borders of one State, then indeed, it is relatively easy for a single State attorney general to handle the matter. On the other hand, if you have a national antitrust conspiracy, with a number of States being affected, it is not difficult to understand why it is desirable for the States to join together and to hire one firm to represent all of them is that particular case.

I see some reference to fees being paid to these special counsel. I would simply point out that any fees, so paid in any antitrust case that I have been aware of in recent years, have been approved by the judge presiding over the case.

Mr. Handler further suggests that there be a limitation on the compensation paid private counsel and that the limitation be the salary paid the State attorney general who authorized employment. Well, Mr. Chairman, as attorney general of Virginia, that comes to about the minimum wage, at the present time. It is really quite difficult to get competent counsel on that basis. I enjoy public service, however, and consequently that is why I am in the position I am in.

But, in response to Mr. Handler, I can only suggest that perhaps exactly the same limitation fees should be imposed with respect to

[1] See prepared statement of Milton Handler, p. 304.

fees paid defendants' counsel in these cases. This, would put everybody on an equal footing.

I think that takes care of my response to Mr. Handler, except with respect to one other "zinger" he got in—that the States base their actions on Federal complaints. Actually, as I have already indicated, in many instances that information is not available to the States and, consequently, the States have had to go on their own and do their own investigation, and in many of those instances, the results have been very favorable, from the States' standpoint.

I wish to express my appreciation to the committee for hearing this presentation.

Senator HART. Well, we want to express our appreciation to you, and those who associated themselves with you this afternoon, in the effort to bring to this record what, I think, is a pretty clear expression of desire on the part of the chief law enforcement officials, I guess you could properly call them, of each of our States; that it would be in the best interest of the people of the several States to enact, as you put it, at least in principle, the bill that we have been discussing.

And I am sure that Mr. Handler, while he may have intended just to summarize that statement, will, nonetheless, give a little fuller attention to pages 15 and 16 when he gets around to it.

Have any of you made a study, or has any study come to your attention, that goes to whether there is a constitutional requirement of notice, or whether it is something that we either turn it over to the judge to make up his mind, or we, by statute, can fix a limit beyond which actual notice need not go?

In other words, let us assume we agree that we ought not require notice beyond a certain point, a point which could be exceeded, if we wanted to put that kind of money out.

Has anybody turned up any study that would tell us whether we could constitutionally do that or not?

Mr. MILLER. I know of no treatise on this very point. This is not to say that perhaps there is not some law review article which addresses it.

In response to your question, however, I think that for the antitrust effort in this country to have public credibility, it is very important that no segment of the American community feel that it is being handled in such a way as to be unfair. That is why I made the proposal that the procedures of rule 23(C)(2), which have been developed be written into this bill, so that those who are prospective defendants, and, have up to this point, been able to escape with violations of the act because such violations have been in areas where a large number of consumers are concerned who have not had effective representation up to now, that there would not be any question raised and that what was being done in the proceeding was absolutely fair in terms of notice.

I feel as to what is appropriate notice, in any particular case, is a matter for the judge. But I do feel that the best practical notice should be given under the circumstances.

Senator HART. I think it was General Hyland who described the antitrust law in New Jersey as perhaps the toughest of all. Title II of S. 1284 attempts to give broadened civil investigatory power to the Department of Justice in some considerable detail. Does the New

Jersey law have comparable grants of authority for preliminary civil investigative efforts?

Mr. HYLAND. Yes, Mr. Chairman. Section 56:9–9 of the New Jersey statutes describes the investigative authority that the attorney general has. It is essentially an administrative type of subpena, very broad. The section also has provision for testimonial immunity to witnesses who appear and are compelled to testify, notwithstanding their fifth amendment rights, except, of course, through the false swearing of perjury.

And we have the feeling that this is a very important part of our statute and I am assured by my predecessors that we have had no charges of abuse, although there have been instances, as there would be in any investigation, where the propriety or the scope of a subpena has been challenged.

I recall a reference in an address made by Joe Sims—Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, I think is his present title—indicating that this type of power was at the very heart of effective antitrust enforcement.

And, in our State, I would say we not only have it but we use it, and we have not been charged, I think, with any abuse of it.

Senator HART. General Miller, you made the point that inasmuch as tax dollars fund the grand jury and Federal antitrust investigations, that access under reasonable ground rules should be available to the States with respect to grand jury documents and transcripts. Would you limit access to States' attorneys general, or would you include in that the right to inspect and analyze private plaintiffs?

Mr. MILLER. My reaction to that would be, with the powers given attorneys general of the State under this bill, that a modification of the existing policy to permit the exchange of information between the Department of Justice and the offices of State attorneys general would be highly desirable.

I think we should see how that works. At the present time, the Antitrust Division of the Department and the FTC exchange information. There is no reason why this cannot be done with respect to State attorneys general.

I am not prepared at this time to recommend to the committee that, in fact, the information be made more broadly available.

Senator HART. Perhaps not even worthy of a footnote, but just out of curiosity. In connection with the *Hawaiian* case of the late 1960's or early 1970's, have you any idea how much State money was expended in support of the litigation?

Mr. AMEMIYA. I am sorry, sir, but I do not have those figures with me. It was a protracted bill.

Senator HART. I remember that. It is conceivable that in the budgeting of the office it would not be allocated anyway, but if, on your return, it is a figure that a fair estimate can be fixed, I would welcome having it for the record.

Mr. AMEMIYA. Yes, I will send it.[1]

Mr. MILLER. If I may make a suggestion, Mr. Chairman. I would think that *California* v. *Frito-Lay* case involved a similar case, unsuccessful, which also might be pertinent to the point that you are making.

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[1] See letter of June 12, 1975, p. 670.

Senator HART. Yes. If, in the office of any of our witnesses, there is a figure that is reasonably accurate, indicating the expense to which States have been put, it would be welcome for the record.

Mr. SHACK. Mr. Chairman, if I could respond briefly. As I mentioned, we recovered approximately $55 million in the last 8 years. And that the approximate cost of that in California was $2½ million. I can get more precise figures.

Senator HRUSKA. I would like to add my welcome to the members of the panel, to the welcome extended by the chairman. I am glad to have the chairman of the Association of Attorneys General present on this particular subject. Which subcommittee, or committee are you a member of, Mr. Miller?

Mr. MILLER. It is the Antitrust Committee of the National Association of Attorneys General.

Senator HRUSKA. Is it an ad hoc committee?

Mr. MILLER. No, Senator, it is not ad hoc. I have been chairman of this committee since 1971. If I am ad hoc, that puts us on an equal footing. The antitrust committee has had a long history in the national association. In recent years, and as a consequence of some of the efforts of my predecessors, it has become increasingly active, and it has been my pleasure to serve as chairman the last 4½ years.

Senator HRUSKA. I have heard my compatriot and fellow Nebraskan, Clarence Meyer, speak of you, and you must be a very intelligent man. He thinks you are preeminent authority in the field.

Mr. MILLER. I am interested in that observation. General Meyer and I are very good friends; however, I think that he must be overstating his observation of my capability because, clearly, I do not claim any such preeminence in the field.

Senator HRUSKA. All of which shows you are a very modest man. I do thank you for your appearance before the Senate Judiciary Committee against the Federal no-fault auto insurance bill, in the previous Congress.

Does the National Association of Attorneys General have an official position on S. 1284, or any of its titles?

Mr. MILLER. Senator Hruska, the National Association of Attorneys General did take an official position with respect to the House bill, which I referred to previously, H.R. 12528. And it was as a consequence of the National Association taking that official position, that I, and other members of the antitrust committee, appeared before the House Judiciary Committee.

In regard to S. 1284, the National Association has not had an opportunity to consider this matter. However, the National Association is meeting in Boston, the last week in June of this year, June 25 through 28, in its semiannual meeting. This matter is on the agenda at that time, and I'm confident that the National Association will take a position.

Senator HRUSKA. Mr. Hyland, you have referred to the record of New Jersey as having been vigorous in the assigning and enforcing of antitrust laws, and in another place, you indicate that the act before us gives, for the first time, the right to the State to sue price fixers.

I wonder how truly and consistently the State of New Jersey has the interest of the consumers at heart. That's what we're talking about, as I understand.

This subcommittee has reported S. 408, a bill to repeal the fair trade laws. I have strongly urged its repeal. In view of the fact that New Jersey has been one of the States that has had a fair trade law, which law is a deliberate and very conscious exemption to the antitrust laws, what is the justification for the rationale of it?

Mr. HYLAND. Well, Senator, Governor Byrne has been in office only 15 months, but I'm happy to report that 2 days ago I was in his office when he signed the repeal of the fair trade laws in New Jersey. This was a proposition that he had campaigned upon, and I believe there were some 30 States with fair trade laws still on the books, as of the beginning of this year, and New Jersey now has left that unhappy fold.

So I think that your concern has been met.

Senator HRUSKA. Has the Governor signed the bill?

Mr. HYLAND. Yes; 2 days ago.

Senator HRUSKA. The repeal is complete.

Mr. HYLAND. Yes.

Senator HRUSKA. Congratulations to him and to you.

Mr. HYLAND. The only exception to that is with regard to liquor, which is still fair traded, and tobacco products.

Senator HRUSKA. Which products?

Mr. HYLAND. Tobacco products.

Senator HRUSKA. How much tobacco do you grow in New Jersey?

Mr. HYLAND. We pick up a lot of that funny tobacco on our turnpike, but——

Senator HRUSKA. That last question was meant to be facetious.

Mr. HYLAND. We defer to Virginia for all of our——

Senator HRUSKA. Mr. Miller, has Virginia repealed its fair trade laws?

Mr. MILLER. Senator, I come to you in a very unhappy state of mind in response to that question, because I introduced, or had introduced, at the last session of the general assembly, a bill which would repeal Virginia's own fair trade law, and it passed the house of delegates, our lower house, overwhelmingly.

Unfortunately, in the Senate, it lost by one vote. I expect to be back next year. The individual who was in charge of the opposition to the bill may not be returning.

Senator HRUSKA. Now, in Oregon, and I'm calling the roll, what is your situation? Have you repealed your fair trade laws?

Mr. DUNNE. We have repealed our fair trade laws.

Senator HRUSKA. It's been repealed?

Mr. DUNNE. Yes, sir.

Senator HRUSKA. And I know in Hawaii you have no fair trade law, do you?

Mr. AMEMIYA. No, we don't.

Senator HRUSKA. Now, let's see. Where do we come now—California? California has a fair trade law, unless it's been repealed in recent days.

Mr. SHACK. Senator Hruska, we have the dubious distinction of having passed the first fair trade law in the Nation, and we're very aware of that and we regret that very deeply. But I'm happy to report

to you that the repeal bill, which the attorney general's office has sponsored, has passed the assembly without dissent and has cleared the final Senate committee of the California State Legislature without a dissent, and we fully expect that within about 1½ months, we will have repealed the fair trade law as well.

Senator HRUSKA. Well, isn't that fine? We are making progress. This committee is processing that kind of a bill—to repeal the Miller Tydings and the McGuire act so that we don't have that kind of trouble—and there's a lot of thinking that we ought to be getting at it pretty soon, by way of marking it up out of the committee and reporting S. 408 to the Senate with the House of Representatives taking similar action.

In another field, that of designating special counsel for your antitrust violation cases and the collection of treble damages, what is the reason for appointing special counsel?

You've kind of defended, Mr. Miller, the expertise and the elegance and the proficiency of various attorneys general. And yet there are, in many of these cases, employment of special counsel. Is that because they are better or that the attorneys general staff is not big enough to handle it? What is the reason for it?

Mr. MILLER. I think there are several reasons, Senator Hruska. First of all, many States, until the last 3 or 4 years, did not have separate antitrust sections, particularly the smaller States.

It was a question of overall budget, and consequently, it was felt that priorities were going to have to be placed, and enforcement of the criminal laws in areas outside economic crime. I'm talking about handling the usual litany of crimes—murder, rape, robbery, et cetera—with respect to appeals of those cases, habeas corpus proceedings, et cetera, and it was a question of priority.

But in the last few years, even States which are relatively small have begun to set up antitrust sections. Even if one has an antitrust section, however, there very likely will be a significant amount of violation of State antitrust laws, which absorbs the activities of that section within the confines of a particular State, or violations of Federal antitrust laws, which are parochial in effect.

They may have an impact on interstate commerce, but nonetheless, the violation is localized within the boundaries of a particular State, and consequently, it is felt that there's where priority ought to be given, as far as State offices go.

But in cases which have a nationwide conspiracy, it is extraordinarily difficult to get 25, 30, or 35 law firms, if you will, working on a single case. Therefore, it has seemed appropriate to attorneys general—even those which have antitrust sections to a particular degree developed in their offices—to retain special counsel in these cases.

Now, as time goes on, I don't think there's any question that there is going to be considerably less reliance on special counsel than in the past, because the capacity of individual State offices of attorneys general has been growing to the degree which I've observed it over the last several years.

Senator HRUSKA. You referred to another witness, Mr. Handler, as suggesting that the counsel, after all, inasmuch as this act would enable the attorneys general to pursue that remedy, in order to conserve the fruits of that remedy properly applied and eventually evolving into a decree or judgment, maybe it would be well to eliminate the

contingent fee and pay them the regular salary of the attorneys general, to whom the task was originally assigned by the Congress.

Now, you referred to minimum wages in the field of the attorneys general, and I'd like to remind you that Members of Congress and the Cabinet and of the Federal Judiciary, haven't had a pay raise for 7 years. That's a long time and that's aside from the point.

But what do you think of that idea?

Mr. MILLER. Well, let me say, first, Senator Hruska, that those of us in State government regard Congressmen, Senators, and Federal employees, as having a Midas touch, which unfortunately we lack, in terms of compensation.

The compensation level, for instance, of State attorneys general, can only be compared invidiously to that of Members of the House of Representatives on average.

As a matter of fact, in the State of Arkansas, there's a constitutional limitation of $6,000. But we enjoy serving the public, sir, and as far as the utilization of special counsel goes, if, in fact, you had to have every State attorney general who was interested in a particular case, prepare that case from the standpoint of his office, I submit to you that in a national antitrust conspiracy, frequently—not always—but frequently, the amount of money spent by each office, if that office prepared the case itself, would be far and above what would be paid to a single law firm retained by a multiple number of States for the purpose of representing the States' interest in that particular case.

I would further mention, as I stated in testimony previously, that the fees which are paid are, indeed, set by the courts before which the cases are pending, and consequently, it's not a matter of private agreement, if you will, as to what indeed should be appropriate compensation under the circumstances.

Senator HRUSKA. But it might be assessed by a judge as just as high as that would be reached by private agreement, if they're both high.

But it's the principle of the thing. After all, we don't farm out other types of cases. We don't farm out criminal cases. We don't farm out other cases.

I don't want to belabor the point. I think it is marginal for the real thrust of this bill, but we wouldn't want to have it get into the category of having it develop into an attorney's welfare fund rather than a fund for reimbursing consumers that were imposed upon. That's one of our ideas.

Mr. MILLER. Well, Senator Hruska, in response to that, I think that any member of the antitrust bar, whether in a public or a private capacity, would advise the committee that there is just an extraordinary amount of work which has to go into an antitrust case.

Now, you're talking about literally thousands and thousands of hours, and sometimes tens of thousands, and I think it would not be proper to suggest that individuals who engage in this activity, which is highly specialized, shouldn't be paid a reasonable fee or salary, depending upon the context in which the activity takes place.

Senator HRUSKA. Can they work more than 24 hours a day, whether they're working at that or prosecuting regular cases in the attorneys general office?

Mr. MILLER. Well, the difficulty, Senator Hruska, is with respect to the small office. Now, California, as Mr. Shack has previously advised

the committee, has a very vigorously developed antitrust program, as do a number of other States, such as New Jersey and the ones I mentioned previously. But if you have a small State which has the capability of handling local antitrust cases, there simply is no way that the attorneys general can justify having somebody, or a group, full time, on his staff to handle antitrust cases until the record has been established of what can be accomplished in that regard. Once that record is established, then, as I suggested earlier, the utilization of special counsel is going to be significantly decreased.

What S. 1284 does, is to provide the vehicle by which that record can be established.

Senator HRUSKA. Well, this is the last comment I'll make on that subject. Sometimes it takes years and years and years for the Federal Antitrust Division to develop a case.

They have the testimony, the transcript, and they have everything. They've got all the investigators and everything.

Somebody on behalf of the private litigant or somebody on behalf of the Attorney General gets busy with that record and he goes in and gets a judgment.

I don't know that the court, in awarding a fee, ever awards any part of that fee to members of the Antitrust Division of the Department of Federal Justice, does it? Have you ever known that to be done?

Mr. MILLER. I think that would probably be against the law, sir, but I haven't checked it.

Senator HRUSKA. Well, not in their individual capacity. The reimbursement would go to the Government and the taxpayer that furnished the money in the first place. But I don't think that is ever done. I haven't heard that it has been done.

Mr. MILLER. I am not aware of any instance in which that has been done, nor any instance in which any staff member of the State attorneys general office has been compensated on that basis.

Senator HRUSKA. Well, it wouldn't be the member of either the State Antitrust Division or the Federal Antitrust Division, in his personal capacity, getting the money, but it would be a reimbursement of the Government and the taxpayer that furnish the salary and the expense money for him to have compiled that record.

Mr. MILLER. Well, I think, sir, in terms of benefit, one ought to analyze the problem from the standpoint of the taxpayer getting a return on his money. The money which has been paid in taxes, at either the State or the Federal level, develops certain information which should, under certain controlled circumstances, then be available to other governmental agencies in order for them to discharge their functions appropriately.

And if, in a particular instance, a degree of specialization is required, which a single State office does not have, then it seems to me perfectly appropriate to retain special counsel for the purpose of pursuing that particular matter.

In another field, for example, Virginia does not have a substantial number of proceedings before the CAB, and consequently, when an issue over at National or Dulles Airport is involved, I retain special counsel for that purpose, in order to represent the Commonwealth of Virginia before the CAB.

And no one has suggested to me, that because of the fact that that individual is acting as a lawyer in the private sector, that he should not be compensated for the services which have, in fact, been rendered.

Senator HRUSKA. Well, I'm sure he should, but, of course, he doesn't recover any big judgment and get paid for it on the basis of a commission, does he?

Mr. MILLER. I would say that an analysis, and I don't have this information available to me in the form of a study of the fees which are paid to counsel for defendants in antitrust cases in this country as a group, compared with the fees that are received by members of the plaintiffs bar, as a group, would put the fees paid to counsel for defendants in those cases at a considerably higher level than the actual amount recovered by plaintiff's counsel.

Senator HRUSKA. We talk about consumers, and they are parties of interest, of course, and we are very interested in their well-being. However, under this pending bill, the one that's before us, and I believe the same thing is true of the House bill, the Attorney General is enabled, and empowered, and authorized to represent all claimants under a case of this kind, whether they are consumers, retailers, wholesalers, or whether they are public or private hospitals or public or private utilities, or fuel users, whatever.

Now, isn't it a truism, almost, that a professional man, like a lawyer, especially a lawyer, would be quite incapable of presenting the many sides and representing the many facets of interest represented by those various classes, and yet this bill provides and requires that he do so.

Now, how do we get rid of that conflict among clients and their interest? Have you some explanation for it?

Mr. MILLER. I think your point is very well taken, Senator. I agree with it, and that was precisely the reason—perhaps this was before you had the opportunity to come into the room—that I suggested an amendment to the pending bill, which would change the word, "persons," to "natural persons," so it would be very clear that you, in terms of the parens patriae impact, would, as an attorney general, be representing only individuals who were consumers in their personal capacity, and not retailers and other corporations as otherwise might be the case if the word, "persons" was retained as is presently found in the bill.

Senator HRUSKA. But if you limit it to "natural persons," there are some natural persons that own big businesses, and there are also some businesses that are run by natural persons but they are either a partnership or a corporation in form.

Now, you'd get that all mixed up, anyway.

Mr. MILLER. No, I don't think so, not in the way I phrased it a moment ago. I said "natural persons acting in their personal capacity."

In other words, as individuals not related to business endeavor. I agree with you that as far as the business sector is concerned, that such entities usually have counsel and are able to take care of themselves, whereas the purchaser of Frito-Lay chips simply is not in that position.

Senator HRUSKA. Well, it has been said that where the attorney general would be authorized and he would be required, in fact, to represent all parties, he could not constitutionally, and certainly not politically say, "Well, I'm going to represent only the retailer and

I'm going to let the factory go to the devil. I'm going to let the consumer go. I'll just represent the retailer," or vice versa, that he would represent only the factory.

The example was given in one of the papers that I remember reading of tool-and-die makers that have as their customers, General Motors, Ford, Chrysler; people like that, and they would either violate the antitrust laws or they would agree to fix prices and so on, and the attorney general would then have to find out who has standing in court to sue.

Obviously, the automobile manufacturer would have, under those circumstances, standing to sue. Would the purchaser of a car have a standing to sue in such a case, and who would decide that, and would the attorney general say, "No, you don't," and if he says, that, "No, the consumer doesn't have standing in court," is the consumer being taken care of? And that's the purpose of this bill.

Mr. MILLER. Yes, sir. I think, as far as what the attorney general decides in a particular instance, as to whether or not a suit should be filed, of course, is an exercise of professional judgment on his part, just as it is with any other governmental attorney, or for that matter, in the private sector, as far as giving legal advice goes.

If he made the wrong decision in a particular case, presumably he wouldn't be serving as attorney general during the ensuing term.

But as to whether or not a particular group of consumers should recover, being represented by the attorney general in a given case, would be a matter, of course, for the court to decide under the specific facts of that case.

Senator HRUSKA. Mr. Amemiya, you have referred to the *Hawaii* v. *Standard Oil* case. What was the prayer in that case and what was its theory?

The State sued Standard Oil Co. What did they seek to recover? What remedy did they pray for?

Mr. AMEMIYA. Yes. Basically, there were two points. One was for just relief, and second, for damages alleged, which was sustained.

The case revolved around the theory which we tried to argue that the State of Hawaii, in the role of State regard, could sue for damages for injuries to the State economy, and basically, that was what was involved.

Senator HRUSKA. Was that damages or injury to the economy of the State?

Mr. AMEMIYA. Yes, sir.

Senator HRUSKA. Was the individual consumer included in that, by way of class injury, or was he not mentioned in the proof of damages?

Mr. AMEMIYA. Well, this case had the complaint amended three or four times, if I recall correctly. I am not sure whether or not—I'm sorry—we did bring in an action as representative of the class of all purchasers in Hawaii.

But as the case turned out at the end, it revolved around the parens patriae theory for damages or injury to the economy.

It was discussed earlier in one of the opinions. But ultimately, it revolved around this theory, which is set forth in the S. 1284.

Professor HANDLER. Mr. Chairman, it is now 2:55. I wonder whether I could make inquiry as to what the plans of the subcommittee may be with respect to the length of time it will sit today.

Senator HART. Professor, do you have a plane problem?

Professor HANDLER. I have a problem with getting back to New York, and I was told that I would be called at 1:30 p.m. when I telephoned yesterday, and it's now 2:55.

I just wonder whether I could be enlightened by the Chair as to when you expect to call upon me.

Senator HART. Professor, I think Senator Hruska has just about completed his questions. Subject only to an invitation of any member of the panel to make any closing response they might want, we would be able to hear you within a very few minutes.

Professor HANDLER. Thank you very much.

Senator HRUSKA. Mr. Chairman, I have taken more time than perhaps my share, but there are six witnesses here, and they represent seven States.

This is their chance to show their stuff and answer some of these arguments and some of these subjects with which we must wrestle by way of making a decision. I don't say that by the way of apology, but I do say it as a matter of getting at the meat of the subject.

I will suspend any further questioning of any members of the panel, subject to the usual provision, Mr. Chairman, that if there is a list of questions submitted, that it can be transmitted to each witness and he can furnish replies for the record.[1] Would that be agreeable?

Senator HART. Would that be agreeable to our attorneys general and their representatives?

Mr. MILLER. Certainly.

Senator HART. General Miller and gentlemen, thank you very much for a very worthwhile discussion.

Mr. MILLER. On behalf of all the gentlemen who are present, I wish to thank the committee for its initiative in considering this very important legislation.

I don't know of any more important initiative which the committee has taken in the field of economic activity in recent years, and I trust that the bill will reflect, perhaps, the suggestions which we have made to the extent which they may be considered meritorious.

[The prepared statement of Hon. Andrew P. Miller follows. Testimony resumes on p. 291.]

TESTIMONY OF HON. ANDREW P. MILLER, ATTORNEY GENERAL OF VIRGINIA—CHAIRMAN OF ANTITRUST COMMITTEE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, RE S. 1284, BEFORE THE SUBCOMMITTEE ON ANTITRUST AND MONOPOLIES, COMMITTEE ON THE JUDICIARY, U.S. SENATE, JUNE 3, 1975

Mr. Chairman and committee members, I appreciate the opportunity this morning to chair this panel and to comment on S. 1284, a bill to assist Attorneys General of the several states in securing redress for the citizens of their state, for damages and injuries sustained by reason of violations of the antitrust laws. This bill is the most significant amendment to the antitrust laws that has been before Congress since at least 1950. Two aspects of the bill are of most particular interest to the states—Title IV (the "parens patriae" provision) and Title VI (the "nolo contendere" provision). My comments will be limited to the provisions in these two Titles.

A. TITLE IV

Title IV has been wholeheartedly endorsed in concept by the Antitrust Committee of the National Association of Attorneys General, which I chair, as well as by the National Association itself. I might mention at this point, in view of various comments that I have heard, that the endorsement by the Association

[1] No questions transmitted.

was the result of mature deliberation by each Attorney General of each state throughout the United States. It was not an endorsement solely by the Executive Committee nor can it be compared to endorsement by a trade association. Each Attorney General is faced with antitrust enforcement on both the national and state levels. Each is fully cognizant of legislative needs on both levels.

I am attaching to this testimony my statements made last year before the House Judiciary Subcommittee on H.R. 12528. The provisions of that Bill are very similar to the provisions of Title IV. H.R. 12528 was reintroduced as H.R. 38 and is now pending before the House as H.R. 6786. I am gratified that most if not all of the suggestions made by the Association on H.R. 12528 have been adopted in the draft of S. 1284. I will limit my testimony today, therefore, to those provisions of S. 1284 that have been commented upon adversely, so that what may emerge from this Congress is a basic concept, supported in principle by all concerned, to the end that greater antitrust enforcement and protection for the benefit of the citizens of the states will result.

In this regard, I would support first the exclusion of corporations from the concept of parens patriae. Thus an amendment to S. 1284 substituting "natural persons" for "persons" would be appropriate. This revision would (1) remove any complexities in litigation involving different levels of the distribution chain and (2) would appropriately limit parens patriae actions to those who would be most directly benefited—individual consumers who do not normally have records reflecting their purchases.

Second, an amendment to incorporate the notice provisions of Rule 23 would perhaps be desirable. This would resolve various complaints about lack of due process in the notification procedures of present S. 1284. As a practical matter, due to the type of consumer actions brought by states, the notice requirements would not be unduly expensive or burdensome.

Third, I would note agreement with the Department of Justice, as Mr. Kauper stated in his testimony on S. 1284 that the consumer remedy provided by S. 1284 should not be diluted by permitting courts to adopt a class action procedure in lieu of the parens patriae concept. By limiting present Section 4C(a)(1) to parens patriae, coupled with a strengthening of the notice provisions, concerns about possible dilution effect should be removed. This same reasoning, however, would not justify removal of the provisions of Section 4C(a)(3) relating to state suits on behalf of political subdivisions. To clarify that the parens patriae concept is not applicable to political subdivisions, and there is no need for it being so applicable, Section 4C(a)(3) should be amended to provide that suit may be filed by a state as a "representative of a class" on behalf of any and all political subdivisions.

Fourth, an appropriate amendment to Section 4C(a)(2) as to measurement and distribution of damages might also be made. This concept—damages to the general economy—has caused some adverse comment. I do not personally believe, however, that such comments are justified. Any difficulties in quantifying damages should be left to the trier of fact and not prohibited as a matter of law. We are not concerned with an attempt to quantify damages on the lack of buying power caused by an antitrust violation which exacts a toll from consumers' pocketbooks. Instead the thrust of such a provision properly relates to the economy of the state as a whole.

To cite an example, in 1972 the Commonwealth of Virginia attempted to bring an antitrust suit in the Supreme Court of the United States against certain airlines relating to the effect of their rate making policies as to Dulles Airport. An individual manufacturer of goods desiring to ship his product overseas would, due to adverse rate schedules, find it more economic to transport his product by truck to Kennedy and fly it overseas rather than ship it directly out of Dulles. Assuming that such activity was not protected by a regulatory agency, in this case the Civil Aeronautics Board, and that an antitrust violation could be shown, it is clear that the economy of Virginia was damaged as a result. I strongly urge that a provision for general damages to the general economy remain in S. 1284 with specific guidelines as to measurement of damages.

The amendment I recommend, similar to that made by David I. Shapiro and attached as an appendix to his testimony, would read as follows:

"*Sec. 4C(a)(2)* as parens patriae with respect to any injury to the general economy of such State or a political subdivision thereof, as measured by any decrease in revenues or any increase in expenditures, or both, of such State or political subdivision sustained by reason of any violation of the antitrust laws, except that such damages shall not be duplicative of any damages recovered under paragraph (1)."

The remaining provisions of S. 1284, Title IV, are still supported in concept other than those provisions of proposed Sections 4D and 4E which allow the Attorney General of the United States to sue on behalf of individual states. For the reasons given in my previous testimony, and those of the Department of Justice submitted by Mr. Kauper, we believe such provision would be a disincentive to states formulating an effective antitrust program of their own. The decision as to whether or not a state should be a party plaintiff to litigation must constitutionally repose with its chief legal office rather than some federal functionary acting in a discretionary capacity.

B. TITLE VI

Let me mention here that I concur with the remarks made by the Department of Justice and others that there is no need for a change in status of *nolo* pleas. Rather than approach this area by giving *nolo* please *prima facie* effect, I would rather see adopted a provision making the fruits of the government's investigation available to other governmental litigants whenever such litigant is a state. The Department of Justice and the Federal Trade Commission currently have a complementary policy of granting access on a confidential basis to data and information secured through an investigation. The Department of Justice has refused to implement such a policy where the states are concerned. The Antitrust Division, unjustifiably in my view, has considered the states as mere private litigants ignoring the reality that the states in many instances seek to recoup monies which have ultimately been paid by taxpayers. It is felt that the time has come to change this policy and, since no modification has occurred on a voluntary basis, a legislative command to this effect would be appropriate.

Limiting such a legislative command to those instances where the state was suing for damages sustained as a result of purchases made by it would in no way disrupt any rule regarding grand jury secrecy. The underlying rule of grand jury secrecy has undergone considerable evolution since *U.S. v. Procter & Gamble Co.*, 356 U.S. 677 (1958). In 1966, *Dennis* v. *United States*, 385 U.S. 855, substantially relaxed the generally accepted harsh rule against disclosure of transcripts. Thus, after referring to *Procter & Gamble*, the Supreme Court observed that—

"In general, however, the Court has confirmed the trial court's power under Rule 6(e) of the Federal Rules of Criminal Procedure to direct disclosure of grand jury testimony 'preliminarily to or in connection with a judicial proceeding.' In *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234, 60 S. Ct. 811, 849, 84 L.Ed. 1129, the Court acknowledged that 'after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.' " [384 U.S. at 870]

Disclosure, rather than suppression of relevant materials, clearly promotes the proper administration of justice particularly when taxpayers dollars would be recouped.

Senator HART. Thank you very much.

A telephone call from Senator Pell of Rhode Island has been received. He has asked that the statement of the attorney general of Rhode Island, the Honorable Julius Michaelson, relative to S. 1284, be printed in the record.[1]

The committee welcomes, and not for the first time, and always in anticipation of a stimulating presentation, Prof. Milton Handler.

Professor, you may proceed.

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[1] See p. 677.

STATEMENT OF MILTON HANDLER, PROFESSOR OF LAW EMERITUS, SENIOR PARTNER REPRESENTING THE FIRM OF KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, NEW YORK, N.Y.

Professor HANDLER. It is a pleasure to appear, again, before my very good friends, Senator Hart and Senator Hruska, to present my views to the subcommittee.

Felix Frankfurter once said that however infinite may be the concept of time among philosophers, it is very finite at a congressional hearing.

Hence, I intend to be brief, as the circumstances may permit. Although, I think it is fair to say that I could speak, and I believe, illuminatingly, to the subcommittee and those present here today about this bill for hours, if not days.

Twenty minutes, which has been allocated to me for my oral statement, permits me to discuss only a few of the salient features of the pending bill.

In my prepared statement,[1] I first have a few words to say about the nolo contendere plea, and the changes proposed in the bill with respect to the evidentiary effect be given such pleas.

Since I want to concentrate my remarks on those aspects of the bill which I regard as more significant, let me state my conclusions summarily.

The changes in the bill concerning the nolo plea will seriously hurt the Department of Justice in its enforcement efforts. It will accentuate the current crisis of the courts; a matter to which Senator Hruska has been giving a great deal of his time recently. It will not, significantly, help the private treble-damage suitor or the States when they endeavor to enforce their rights under the antitrust laws.

It is, in my opinion, a misdirected effort, and that part of the bill should be abandoned.

I have stated my reasons, in full, in my prepared statement and I pass on to title IV, the parens patriae provisions of the bill.

I think that the committee should bear in mind that what you are being asked to do is, to overturn a decision of the U.S. Supreme Court in the *Hawaii* case; one of the very few decisions of the Court in the past 25 years which has been decided against the plaintiff and for the defendants.

Now, this was not an opinion written by some conservative, hidebound reactionary, anti-antitrust judge. The opinion was written by Justice Marshall, whose antitrust credentials are impeccable.

[1] See p. 300.

The present bill that you have under consideration in title IV, rests on premises which the Court, in its opinion, sought, in depth, to demonstrate are dubious and unsound.

I think I can answer Senator Hruska's question—the *Hawaii* case came before the Supreme Court on the fourth amendment to the complaint.

That fourth amendment had to do with parens patriae alleging injury to the general economy of the State.

The class action claim which was contained in earlier complaints was dismissed by Judge Pence because it was unmanageable. This was a consumer class action under rule 23.

The only issue, therefore, before the Supreme Court was the validity of parens patriae in relation to the injury to the general economy.

Now, what did the Supreme Court say about that, relying upon the ninth circuit, which had stated that the injury to the general economy is an abstraction?

What my learned attorney general friends have told you and what Congressman Rodino has done to meet this objection by trying to specify the nature of the injury to the general economy, do not begin to touch upon the problem as perceived by the U.S. Supreme Court and as perceived by those who have given the matter the kind of deep thought and attention which it deserves.

The Court points out that, and I quote from Justice Marshall, "Even the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State."

The former speakers have glossed over the key words of the Clayton Act, section 4, relating to the recovery of damages.

"By reason of." Those are the key words. The recovery is limited to injury suffered by reason of the violations. That means that you have a causal factor. You have got to show that the violations were the proximate cause of the alleged harm to the general economy of the State. And you have not begun to prove that by saying that the revenues of the State have declined or its expenditures have increased.

Expenditures of my native city have increased to the point where we have a financial crisis. And the revenues of this Federal Government have been reduced because of the economic conditions in which we find ourselves.

I defy a Solomon to prove any causal relation between the multifarious violations of law that constitute infractions of the antitrust laws and the loss of revenues to the State, or the increase in its expenditures. It is a logically impossible task.

And before you write into law something which you have been requested to do, but which is illogical, and is incapable of administration, I think you ought to pause.

I am asking you to concentrate your attention now on some of the problems that will arise.

I think you owe it to the American people, your staff, your counsel, yourselves, the committee, the Judiciary Committee, and the Congress of the United States to specify, with particularity, the types of violations that could, conceivably, affect the economy of the State, and then indicate how any court and jury could measure in dollars, any such injury.

Now, whenever you talk about these things, immediately there comes to the forefront, the poor injured consumer and the flagrant antitrust violation of price fixing. This statute is not limited to price fixing, and it is not limited to injuries to consumers. It applies to all antitrust violations and it applies to injuries to any person in the United States suffering from an antitrust infraction.

Now, the attorney general of the State of Virginia suggested that the bill be limited.

Well, I would go beyond. I think the bill should be dropped. But I certainly endorse his notion of limiting the scope of the bill, but do not limit it in an ambiguous way.

And Senator Hruska was very perceptive in the questions that he put. If this is a bill intended to protect consumers, say so. And limit the bill to consumers. That's not the Rodino bill, and it is not the omnibus bill. It is not limited to consumers at all.

Now, I will address myself to that phase of the parens patriae bill in a moment, but I now am dealing with the part having to do with the injury to the general economy.

Let us suppose that we have the flagrant antitrust violations like price fixing, division of territories, allocation of customers, control of production at any of the levels of our economy; manufacturing of finished products, manufacturing of industrial products to be further processed, manufacturing of items intended for ultimate consumer use, manufacturing of parts that are used in assembling other products.

Suppose the restraints occur at any one of the distribution levels that exist in our economy. What are the facts that the subcommittee has in mind that would constitute an injury to the State's economy? How does one prove that the economy of a State, or a group of States, or all of the States, have been injured by a merger, which is an antitrust violation? How does one prove that such violations as vertical territorial restraints, consignment agreements, agreements not to contest the validity of a patent, exclusive dealing, price discrimination, are the proximate cause of injury to the general economy of the State?

Now, the courts have indicated that they do not think that these problems can be resolved.

I think this committee has to earnestly wrestle with the way in which you prove this causal factor.

Senator HART. Professor?

Professor HANDLER. Yes, indeed?

Senator HART. So that we understand each other——

Professor HANDLER. I am a little deaf. So I am going to ask you to talk a little louder.

Senator HART. Well, I am a little slow. So together we will make out.

Professor HANDLER. Right.

Senator HART. If proof is possible, that because of an antitrust offense—Detroit, for example, atrophies as an auto center—there should be recovery available to the governmental unit, should there not?

Professor HANDLER. You are asking me that if the impossible becomes possible, would I change my view?

Senator HART. I am rejecting the assumption that it is impossible to prove.

Professor HANDLER. I know you are.

Senator HART. And I am inquiring if you would assume it is possible, would you then agree that we ought to be able to do it?

Professor HANDLER. I am asking you, in turn, to give me a concrete case where an antitrust violation has affected the general economy of the State in such a way as to be capable of monetary measurement. And if you give me such a case, I would say that I have no objection whatsoever in having recovery of provable damage.

But, with all respect to the learned Senator from the State of Michigan, I defy you to give me such a state of facts.

I have pondered over this and I know of no such instance where you can prove that the general economy has suffered.

Now, I do not know whether the Senator knows that after the *Georgia* case, which was an original case that came before the U.S. Supreme Court where they upheld parens patriae under section 16, not damages but an injunction, the matter went back to a special master, and the case died. And nothing ever happened because of an absence of proof.

The injury to the general economy could not be shown sufficient to warrant an injunction, to say nothing about an injury sufficient to warrant the recovery of damages.

Now, I turn to what is the more important aspect of the bill, the part that has to do with parens patriae for injury suffered by citizens, residents, or persons in a particular State.

It is quite extraordinary to me, and I think it should be quite extraordinary to you that the Rodino bill, as originally introduced, had no provision whatsoever for exclusion.

The net result was that the Rodino bill, a bill introduced by the chairman of the House Committee on Antitrust and Monopoly, a bill intended to promote antitrust in this country, had the effect, as written, of abolishing the treble-damage action, which is the most potent weapon in the antitrust arsenal.

That is a rather extraordinary statement, is it not? But all injuries to all persons within a State were vested in the attorney general of the State. And I say, by simple mathematical logic, if you give some things exclusively to the attorney general, and you have no provision for exclusion or for opting out, you have taken it away from somebody else.

How anyone could believe that that would have the effect of enhancing the potency of antitrust enforcement is completely beyond me.

Now, Your Honors had the prescience of providing for exclusion. And your bill provides that these actions of all persons injured, vest in the State unless the party injured opts out or excludes himself from the proceedings within a period of 30 days after a publication of notice.

Now, I want to emphasize the point, with all the energy and earnestness of which I am capable, that this bill does not apply to consumers only. It applies to businessmen, manufacturers, suppliers, competitors, wholesalers, retailers, anyone who is injured by an antitrust infraction. His Federal right of action is taken away and transferred to the State of his residence unless prompt action is taken to preserve his rights in response to a published notice that may never come to his attention.

And I ask the subcommittee, does it feel that this is a fair provision? Does it feel that this is a provision which is consistent with American traditions; to confiscate a right of action when some of them involve vast millions of dollars and vest it in a State if there has been a failure to opt out within the limited period of time set forth in the bill?

If you study the origins of the concept of parens patriae which we have, and I have with me one of my partners who has written the leading article on the subject with another one of my partners which was quoted in the *Hawaii* case by the U.S. Supreme Court, this was a device by which the State brought parens patriae actions for paupers, lunatics, and other kinds of people unable to maintain and protect their own rights and interests.

Is there any reason why we should treat modern businessmen like paupers and lunatics, incompetents, that their suits have to be brought by the States' attorneys general?

So the very least you can do if you are interested in consumers is to say so, and limit this bill as a parens patriae bill by States in behalf of consumers. But then you have a lot of additional questions.

Let me take one example to show you the kind of difficulty that you run into when you talk about consumer injuries.

Everything that happens in life, ultimately, affects the consumer. If an arsonist burned down a factory to its foundation so that goods are not produced, that could create a scarcity. That could, ultimately, have an effect on the price level.

Many things that you gentlemen do on the floor of Congress, with all the best intentions in the world, have deleterious effects upon consumers.

You cannot, in stimulating the economy as you are doing, go in for deficit financing at the rate of which this country is, without fueling the forces of inflation.

You cannot adopt measures that create unemployment, as this Government has done, without hurting the consumer.

The fact that the consumer is hurt, does not necessarily mean that he has a cause of action. We protect the consumer in other ways.

Now, let me take a specific example.

Both of you Senators know, in particular, Senator Hart, who comes from Michigan, that an automobile consists of innumerable components, some of which are manufactured by the automobile companies, some of which are obtained from other manufacturers.

Let us take a spark plug or a tire, or the steel, aluminum, or plastic used in the vehicle. Let us suppose that there is price fixing at the manufacturing level for one or more of these items.

The overcharge is paid by the automobile manufacturer in the first instance. If he absorbs the overcharge, he is the only one who has been injured, and a suit by anyone else further down the line of distribution would necessarily fail.

Let us suppose, however, that it can be proved, in spite of accounting difficulties, that he has included, in whole or in part, the overcharge as one of the elements of his own price.

The automobile manufacturer may sell through wholesale distributors or directly to the retailer. And the retailer, then, resells to the consumer.

The overcharge, we will assume, is included in the published price of the automobile.

However, the wholesaler may get a discount from the manufacturer or the wholesaler may give a discount to the dealer, or the dealer may make his purchases as part of special promotions.

The ultimate buyer comes into the showroom and engages in hard bargaining. He may receive the published allowance. He may receive a generous trade-in, or he may be given a discount from the published price based on his bargaining ability.

Now, let us go back, then, and assume that the automobile manufacturer purchased from a price fixer one or more components. How does the consumer establish that the antitrust illegality, somewhere back in the chain, was the proximate cause of the injury that he may have suffered?

Justice Holmes dealt with that problem. Justice Brandeis dealt with that problem. Some of the titans of the law have dealt with that

problem. They concluded that the direct purchaser, the first purchaser, is the one who may sue and no one else, on the theory that when he is made whole, the benefits are passed down the line of distribution, ultimately, to the consumer.

You have my statement and I am not going to take much more time. I am not going to discuss this matter any further. I am not going to discuss the Bayh bill which leaves me absolutely speechless.

To say that 20 percent of the gross revenues of a company shall be assessed as damages whenever there is an antitrust violation, when you can have hundreds of different types of violations, it is clear that the bill is not addressed to the severity of the violation. It is not addressed to the injury which it has caused. And 20 percent of the gross revenues of a company can amount to a lot of money.

You could have a minor violation by a meat company that does a billion dollars worth of business.

Typically, in the meat business, you are lucky if you make $10 million after taxes on the basis of $1 billion of gross revenue. So for an unlawful provision in a patent license agreement, or in a contract, you would assess damages of $200 million. That hardly makes sense.

I say, with all the earnestness of which I am capable, and I quote from my own statement, business is not a dirty eight-letter word. Business is necessary for the welfare of this country.

You do not want a Federal economy like a city economy, where it is said, that of every four people, one is on relief, one is in the employ of the Government, and two are gainfully employed.

Mr. Kauper said this—he is no apologist for defendants, he is in charge of the enforcement of the antitrust laws; a very able man—he said that if you leave these matters unquantified, you can have damages assessed that would drive into bankruptcy, the largest companies of this country; companies that are multibillion in assets.

Do you want to drive the companies in this country into bankruptcy, and drive people out of employment?

I say that you are throwing the baby out with the bath. You have just raised the penalties. If you want to raise the penalties some more, consider that. Likewise, if you want to consider other deterrents. But do not create a reign in which modern business cannot perform its salutary purposes.

Now, your bill presupposes a set of facts which simply does not exist.

You assume widespread violation of the antitrust laws that are not vindicated. That just is not so.

You have, approximately, several hundred cases brought by the Department of Justice, that are pending in the courts. They are not tried because you do not have enough judges. You have 1,200 total-damage actions brought. They are piled up in the courts.

You have increased the powers of the Federal Trade Commission. You have a private bar that spends 99 percent of its time enforcing the antitrust laws by prophylactic advice, advising people not to violate the antitrust laws.

Now, the learned attorney general from the State of Virginia took some potshots at page 15 and 16 of my presentation.[1]

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[1] Mr. Handler is referring to Mr. Miller's testimony on p. 276.

It happens that, in my career, I take great pride in what I did in getting the States into the Antitrust Act.

When Senator Javits was attorney general of my State, he appointed me as the head of a prestigious committee. At that time—I think he is now concluding his third term, so we are talking about 15 or 16 years ago—we made a study of the States' statutes. They were a dead letter in most of the 50 States.

I had Jack Greenberg of the NAACP as my executive director. We rewrote the State's statute. We had the support of the present Vice President. We rendered a report. The statute, as we reworked it, was enacted.

We then went to the subject of unfair competition. This led to a movement throughout the States, and new legislation was enacted.

Why don't the States' attorneys general enforce their own laws? Isn't it a curious federalism that the Federal laws should be enforced by the States? When they are injured in their proprietary capacity, they should bring suit.

If you want to protect the consumers, you have pending in Congress, a consumer agency bill. Why do you need anybody other than the Federal Government to protect the consumers of this country?

If the Attorney General of the United States, who knows the facts, you have given him the money, you propose to treble his appropriation—if he, having made an investigation, concludes that consumers have been hurt and that they are incapable of protecting themselves, and he so certifies, let him or the FTC bring an action. That's the simple way of doing it.

Now, I think the facts speak for themselves.

Your question, Senator Hruska, was never answered; why they hire lawyers on a contingency basis. And I think it would be very helpful if this committee were to ask the attorneys general—you said you would send them questions. Let them list the names of the attorneys whom they have retained, and the amount that those attorneys received in cases that were settled. You would be shocked.

Individual attorneys have received more than used to be appropriated for the FTC or the Department of Justice. You are talking about millions of dollars.

Why should you create this kind of a bonanza for lawyers? I do not understand it.

Let me just conclude.

I brought with me a lecture, in which I did a great deal of work, which I delivered on April 5 as part of law alumni symposium of Columbia University Law School, which shortly will be published.

This paper deals not only with the narrow topics that I have discussed, but with other aspects of pending antitrust measures that are now being considered by both the House and Senate.

In the hope that what I have written may provide some enlightenment, I am submitting a handful of copies to the members of the subcommittee, I understand that you have 10, for your personal use or in the chairman's discretion that might be published as an annex to my remarks.

Members of the subcommittee, Senators Hart and Hruska, I have spent almost five decades of my life in the vineyards of antitrust.

I have participated, either professionally or on my scholarly work, in every antitrust development in the past 50 years.

My experience has not been limited to any one side. I have represented plaintiffs and got enormous recoveries for my clients on proving that they were damaged; some of the largest recoveries in the history of this Nation.

I have represented defendants in antitrust litigation of the most complex and historic proportions. I have worked closely with the Antitrust Division in the past. I have taught the subject for 45 years at Columbia, and I have written and lectured extensively on, virtually, every aspect of antitrust and its enforcement.

As I stated on another occasion when I appeared before Representative Rodino's subcommittee, I feel that when I appear before the present subcommittee that I am walking into a lion's den.

It is not very pleasant to give testimony that runs counter to the view of many members of the committee. It is much more conducive to a quiet life to hold one's peace and avoid open criticisms of another's handiwork.

I fully share, and I have an open record, and my record supports my statement, that I share this subcommittee's belief in the free market, and the beneficence of free and open competition. I believe with you in vigorous and effective enforcement.

However, the means, in my opinion, you are proposing will turn out to be counterproductive and injure the country to which we owe so much.

For these reasons, in response to your invitation, I have come here to voice my firm opposition to the provisions of the bill which I have discussed.

I thank you for permitting me to appear.

Senator HART. Professor, thank you for your testimony. And let me order printed in the record, the as yet not published article, copies of which you furnished the subcommittee. Though it looks massive, it is, in truth, only some 70 typewritten pages, so that it will be an appropriate addition for our record.[1]

Professor HANDLER. I appreciate it, because it presents facts which are not generally known and which are contrary to some of the facts that have been testified to in this committee, based upon Government sources.

Senator HART. Just as Attorney General Miller reacted to pages 15 and 16 of your prepared statement, I, of course, would react to pages around 65 to 70 in this document you just handed me.

Professor HANDLER. I can well understand that, Senator, but I had a special study made, and I wish you would examine that special study. I think that you will find—and I wish you would ask the Census Bureau to tell you whether or not there is more inflation in the concentrated than in the less concentrated industries.

At Airlie, which both of you Senators attended in part, I asked Professor Weiss, the outstanding expert on these figures, the question which I quote on the relation between concentration and inflation. And you will find that he, on the basis of his studies, finds less inflation in the concentrated industries than in the competitive.

[1] "Antitrust—Myth and Reality in an Inflationary Era," p. 618.

I have taken too much time.

Senator HART. Let's assume that in the markup we process a bill out which would eliminate the damage to the general economy of the State, and that we would require a notice comparable to that which is required in rule 23. How severely would you then criticize title IV?

Professor HANDLER. The bill has to be limited to consumers, everyone else can take care of themselves.

Senator HART. All right.

Professor HANDLER. We agree.

Senator HART. We agree.

Professor HANDLER. But this bill—the present bill is not so limited.

Senator HART. No, it is not.

Professor HANDLER. Second, I think that the best guardians of the consumer would be the Attorney General in the cases that the Attorney General brings and the FTC, to cases that they bring.

And they would certify—don't forget the Statute of Limitations is suspended—sometime in the course of their litigations that this is the type of violation that has injured consumers, and then they would bring the suit for consumers and the money would be distributed to the consumers, and not to the States and not to the lawyers.

You've created the statutes, you can use the money just the same as the States. You have a witness today who will tell you, that in the tetracycline cases, only about 20 percent of the consumers made claims for the money, the rest went for other purposes.

That would be my suggestion.

Senator HART. Senator Hruska?

Senator HRUSKA. Well, I just wanted to thank you for being here, Professor Handler. And Mr. Chairman, I am particularly pleased that his treatise will be placed in the record.

Professor Handler was kind enough to send me an advance copy. It was not thoroughly edited yet, but I enjoyed it very much. I didn't read it from cover to cover, but I read enough of it to know that it is highly pertinent to this series of hearings which we are now holding.

Professor HANDLER. I deeply appreciate your kind remarks. Thank you, very much.

Senator HART. Professor, may we, if there are questions, as we did with the attorney general, submit them to you in writing?

Professor HANDLER. By all means. I will be happy to answer any questions you may care to put to me.

[The prepared statement of Professor Handler follows. Testimony resumes on p. 306.]

PREPARED STATEMENT OF MILTON HANDLER ON S. 1284 (THE "ANTITRUST IMPROVEMENTS ACT OF 1975"), JUNE 3, 1975

In the twenty minutes allotted for my oral statement, I can discuss only a few of the salient features of the omnibus bill now under consideration by this Subcommittee.

First, I want to say word about the changes proposed by Title VI in the effect to be accorded a *nolo contendere* plea. At the very outset of my legal career, I devoted many days and nights in exploring the origins of this plea in English and American law. I was with Justice Stone as his law clerk when he wrote *Hudson* v. *United States*, 272 U.S. 451 (1926), which upholds the power of the Court to impose a penal sentence upon one who pleads *nolo*. The significance of the plea is that it provides a useful instrument by which litigation can be concluded on the basis of admissions made in the particular case which have no effect in any other case.

If one who pleads *nolo* is subject not only to imprisonment and fines but is also bound by his admission in subsequent civil suits, the plea of *nolo* for all essential purposes is converted into a plea of guilty. There is thus lost a flexible device by which criminal cases can be expeditiously terminated.

Your Honors are aware that most criminal antitrust cases are concluded by *nolo* pleas. During the ten years from 1965 to 1974, a total of 149 criminal cases were filed, of which 120 were disposed of by *nolo* pleas and 26 were tried. On the basis of annual averages, the figures are 15 criminal cases instituted, 12 settled by *nolo* pleas, and less than 3 actually tried.

If the effect of a *nolo* plea is changed as proposed, what is the incentive for anyone to settle a criminal case? Rather than plead *nolo*, why not go to trial and take one's chances? If the effect of this measure is to discourage settlements, we will have more criminal cases pending in the courts than the Department can prosecute or the courts adjudicate. Adding appropriations to the Department's budget may increase its manpower, but it does not add to the experience that is needed successfully to try a criminal case. But what is even more significant is that most trial judges, with all of the other cases now assigned to them, can only handle a limited number of antitrust cases—criminal, civil, public or private. Antitrust cases take weeks to try, and put the trial judge out of circulation so that he is unable to handle other pressing matters. The annual number of civil suits started by the Government runs around 43; in 1974, the last year for which statistics are available, as many as 1,230 private treble damage actions were commenced. The Tunney bill, which is now law, is making more difficult, as was its intention, the settlement of Government civil cases by consent decree. If a preponderant number of criminal and Government civil proceedings are to be tried and not settled, we will have to have many more judges than we now have. I want to make clear that I am not talking merely of doubling the number of judges, but of a much greater multiplying factor. This means more courthouses and more ancillary personnel, all at large public expense. I believe it is appropriate to ask for what purpose. Does it make sense to intensify the present crisis in the federal courts in order to simplify the task of those who bring treble damage actions? Shouldn't this Subcommittee, which is part of the Judiciary Committee, follow Chief Justice Burger's suggestion and issue a judicial impact statement on the bill as a whole, as well as in regard to its separate titles?

In point of fact, it is a mistake to assume that this change eases the burden of the treble damage plaintiff to any significant degree. At the time when Section 5 of the Clayton Act was enacted, endowing judgments of conviction with prima facie effect in private civil litigation, the then governing rules of procedure did not provide for the comprehensive discovery that is now available to litigants; very few treble damage actions had been successfully prosecuted; the antitrust laws were enforced by a corporal's guard only; the annual appropriations for antitrust enforcement were no more than approximately a quarter of a million dollars a year; there was no Federal Trade Commission conducting investigations and instituting proceedings; there were no investigations by House or Senate Antimonopoly Subcommittees; and there was virtually no expertise on the part of the private bar in trying antitrust cases. Today the situation is quite different.

I can assure this Subcommittee that no experienced antitrust lawyer would heavily rely on the prima facie effects of either a gulity plea or a plea of *nolo* if the present bill becomes law. We had pleas of guilty in the treble damage private actions brought against the electrical equipment industry in which I was one of the lead counsel. We built our case through discovery. One wants real and persuasive evidence to convince the jury not only that there has been wrongdoing but that the wrongdoing proximately injured the plaintiff in its "business or property"—which, after all, is the heart of a private action and as to which the plea has no relevance. To rely exclusively upon the prima facie effect of a plea would be to diminish rather than to enhance the prespects of substantial recovery.

In sum, therefore, what you are doing here, contrary to the purpose of the omnibus bill, is to impede the administration and enforcement of antitrust by compelling the trial of most criminal cases without any real compensating advantage to anyone. In my opinion, this provision is misdirected and should be abandoned.

I now turn to Title IV, the *parens patriae* provisions of the bill. The thrust of this title is to overturn the recent decision of the Supreme Court in *Hawaii* v. *Standard Oil of California*, 405 U.S. 251 (1972), the opinion in which was written by Justice Marshall, whose antitrust credentials are as impeccable as his devotion to the interests of the downtrodden, the underprivileged and the exploited. The title rests on premises which the Court demonstrated are dubious and unsound.

The bill would authorize two types of *parens patriae* suits: (1) to recover for damages sustained by persons residing in the state, and (2) to recover for damages to the general economy of the state. I propose to discuss each of these two aspects of the title separately.

Absent the provision for exclusion, which was not included in the House bill as originally introduced, the title would in effect outlaw the treble damage action which has provided the stimulus and impetus for effective antitrust enforcement. All damages suffered by any person residing in a state may be the subject of suit by the state to the exclusion of the party sustaining the loss unless he excludes himself by affirmative action from the *parens patriae* action within a period of 30 days. As drafted, the title is not limited to *parens patriae* proceedings in behalf of those lacking the wherewithal or the incentive to sue on their own; it is not a device to protect the interests of the disorganized consumer; it applies to the claims of every resident, including other businessmen such as competitors, suppliers, distributors and the like. *This is the most radical change in the antitrust laws since their original enactment.* It takes away a federal right of action of the party aggrieved and transfers it to the state of his residence unless prompt action is taken to preserve the right in response to a published notice that may never have come to his attention. Does the Subcommittee believe that to be fair? To be consistent with the American tradition of due process? What reason is there for the deprivation of important property rights? How will such a procedure enhance the efficiency of antitrust enforcement? Does this Subcommittee really believe that competitors, direct purchasers, the various types of businessmen who are affected by antitrust violations, need to be treated like paupers, lunatics and the other kinds of persons for whom the states normally act as *parens patriae?*

Even were the bill limited to consumer injuries, it would still pose many serious problems. Let me take just one example. The members of this Subcommittee know that an automobile consists of innumerable components, some of which are manufactured by the automobile companies, and some are obtained from other manufacturers. Let us take a spark plug or a tire or the steel, aluminum or plastic used in the vehicle. Let us suppose that there is price fixing at the manufacturing level for one or more of these items. The overcharge is paid by the automobile manufacturer in the first instance. If he absorbs the overcharge, he is the only one who has been injured, and a suit by anyone else further down the chain of distribution would necessarily fail. Let us suppose, however, that it can be proved, despite accounting difficulties, that he has included, in whole or in part, the overcharge as one of the elements of his own price. The automobile manufacturer may sell through wholesale distributors or directly to the retailer, and the retailer then resells to the consumer. The overcharge, we will assume, is included in the published price for the automobile. However, the wholesaler may get a discount from the manufacturer, the wholesaler may give a discount to the dealer, or the dealer may make his purchase as part of special promotions. The ultimate buyer comes into the showroom and engages in hard bargaining. He may receive a published promotion allowance; he may receive a generous trade-in or he may be given a discount from the published price based upon his own bargaining ability. Let us assume that there is more than one component of the final product that has been affected by some kind of antitrust illegality. How does the consumer establish that the antitrust illegality somewhere back in the chain was a proximate cause of any injury that he may have suffered?

Only a minute fraction of the antitrust cases that have been brought over the years have to do with conspiracies at the retail end, where the ultimate consumer is the direct purchaser and the immediate victim. The overwhelming preponderance of the cases deal with antitrust violations at levels of the economy quite remote from the consumer. It may be that ultimately the consumer bears in whole or in part the adverse effects of the violation. But our law, both of torts and of antitrust, has taken the wise position that only the direct purchaser from the wrongdoer has the right of action, whether or not he passes on the overcharge to others, except in the narrow case of pre-existing cost-plus contracts where the overcharge can be traced with certainty down the chain of distribution. The theory of the law is that if the immediate purchaser has been made whole, the free market will see to it that the benefits are passed on to the ultimate consumer. It is impossible to believe that this Subcommittee intends to reject the wisdom of such titans in the law as Holmes, Brandeis, White, Warren, Black, and Harlan, to mention only some of the jurists who have restricted recovery to the first purchaser in the chain of distribution. I would urge the greatest caution on the part of the Subcommittee before overturning the well-considered precedents

dealing with the vexing problems of the rights of successive purchasers of fabricated products in a long chain of manufacture and distribution culminating in purchases by ultimate consumers.

More heinous than anything else is that the amount of the damages is to be estimated in "the aggregate" without regard to whether actual injury has been suffered. To me this provision is plainly unconstitutional. The law has been extremely liberal, once violation and injury have been established, in permitting the computation of damages in treble damage litigation. But to dispense with proof of individual injury and to authorize the aggregation of damages gives legislative sanction to a process of sheer guesswork which when quantified can inflict irreparable harm to our economy.

When we talk about aggregating damages on the basis of statistical or sampling methods to determine illegal overcharges or excess profits, we are not talking about mere chicken feed. The settlement in the antibiotics case was modeled in part on the *parens patriae* concept. The settlements provided more than $150-million for all classes of persons allegedly injured by the defendants' claimed anti-trust wrongdoing. If the purpose of the omnibus bill, coupled with the Antitrust Procedures and Penalties Act, is to provide added penalties and to create more substantial deterrents against wrongdoing, a more understandable approach would be to increase the penalties and provide further deterrents. I happen to believe that neither is necessary, but such an approach at least has the advantage of being direct. Leaving the amount of the penalty unquantified can lead to the destruction of the modern business system. When I say this I am not indulging in hyperbole; I speak with all the earnestness at my command. Title IV opens the door for the imposition of damage recoveries of unlimited dimension, beyond the capacity of many businesses to pay. This is a classic case of overkill and throwing the baby out with the bath water. It is a distortion of the word "compensation" to permit the recovery of damages which have not been suffered or to qualify a recovery without regard to the nature and extent of the injury, or to turn over damages that belong to one person to someone else, or to have them escheat to the state.

Shockingly, the *parens patriae* bill now pending in the House, recently reported out by Represetnative Rodino's Subcommittee, would extend this notion of "aggregate damages" beyond *parens patriae* litigation to *all* antitrust actions certified as class suits under Rule 23. In essence, the House bill seeks to legislate the "fluid recovery" concept which the Second Circuit has branded "illegal" and "wholly inappropriate" in the context of class action litigation. As Judge Medina wrote for the Second Circuit in the *Eisen* case:

"Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law." (479 F. 2d at 1018).

I submit that the courts are not the only guardians of the Constitution. Constitutional guarantees have traditionally been respected by the legislative and executive branches of government as well. I refuse to believe that this or any other Congress would consciously enact legislation that runs counter to our constitutional requirements.

What possible reason can be advanced for doing away with proof of actual damages simply because a case is allowed to proceed as a class action? It should be remembered that the vast majority of class suits do not involve consumers, but are brought on behalf of businessmen who claim substantial damages and who are perfectly capable of making the effort to prove those damages. Take, for example, an antitrust class action by franchisees against their franchisor. If a single franchisee brought suit under Section 4, he would be required to demonstrate that the alleged violation was in fact the proximate cause of injury to him as well as the amount of his actual damages. But, under the House bill, if he joins in a class suit with other franchisees, neither he nor any other member of the class has to make any such proof. On the contrary, by the use of streamlined statistical procedures, the damages of the class as a whole would somehow be estimated and he would be able to share in the recovery on a pro rata basis, regardless of whether or not he himself sustained any injury whatsoever. This by any test is pure punishment and not compensation. Penal fines should go to the federal government and not to the private suitor.

We are in the midst of a serious recession; some would call it a depression. We haven't begun to solve the problems of inflation. We are engaging in deficit financing of unprecedented scope in order to stimulate the economy and to provide employment. It has always been the theory of our democratic society that em-

ployment should be provided primarily by business rather than by the Government. It would be a sorry day indeed if the situation with regard to our federal government were similar to that now prevailing in New York City, where it is said that of every four potential wage earners one is on relief, one is employed by the city, and the other two are gainfully employed in private industry. Yet if we impose recoveries that will bankrupt or financially weaken even our largest companies, we will destroy the enterprises that have hitherto been the principal source of employment in this country. Is it not time that we adopted a policy of cooperation and not confrontation in regard to the relationship between government and business? Business is not a dirty eight-letter word. It is the foundation of our national economic well-being. Let us enforce antitrust with vigor and efficiency but let us not go overboard and lose sight of our true objectives.

I turn now to that branch of the title that deals with injury to the general economy of the state. The courts tell us that the "general economy" is an abstraction and that logically it is impossible to determine whether and to what extent the economy has been harmed by the antitrust laws. I ask the members of this Subcommittee to specify the types of violations that could affect the economy of a state and then indicate how any court and jury could measure in dollars any such injury. Suppose there is price fixing, division of territories, allocation of customers, control of production at any of the levels of our economy—manufacturing of parts, manufacturing of finished products, manufacturing of items intended for industrial consumption, or manufacturing of products intended for ultimate consumption. Suppose that the restraints occur at any one of the many distribution levels that exist—manufacturing, wholesale distribution, retail sale, ultimate purchase. What are the facts that the Subcommittee has in mind that would constitute an injury to the state's economy? How does one prove that the economy of any one state or group of states or all of the states has been injured by a merger? How does one prove that such violations as territorial restraints, consignment agreements, an agreement not to contest the validity of a patent, exclusive dealing, or price discrimination are the proximate cause of injury to the "general economy" of a state? Since the judiciary believes that it is impossible to adduce such proofs, and since the bill as reported out by the House Subcommittee defines the proof in the terms specifically rejected in the *Hawaii* case, this Subcommittee must earnestly wrestle with the problems of proof which its measure poses. In effect, you are saddling the courts with an impossible task and are here again substituting punishment for compensation—two totally and distinct objectives.

Equally dubious is the notion that one can avoid double recovery by simply saying in the statute that it should be avoided. For one thing, the bill only outlaws duplicative recoveries in the case of injuries to a state's economy and not when the state acts as *parens patriae* for injuries suffered by its residents. But assuming that this defect in the statute is corrected, I think this Subcommittee has the responsibility of telling the courts just how this duplication is to be avoided in practice. I cannot help you because I do not have the knowledge or the wisdom as to how duplication can be avoided when the suit is brought in behalf of any resident claiming to have sustained damage and when individual injury need not be proved. As Justice Marshall put it in *Hawaii:*

"Even the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State." (405 U.S. at 264)

I find it very curious that the Congress, at the present stage of development of our Federalism, should confer unusual and unique powers upon state officials to enforce federal law. Is it because the state attorneys general possess any special antitrust expertise? Is it because they have greater skills than the federal enforcement officials or the private bar? How many of the state attorneys general have ever tried a Sherman Act case? How many members of their staffs have had any antitrust experience? What is their track record with respect to the enforcement of their own state antitrust laws? What success have they had up to date in suing under the federal antiturst laws? Why, if the state enforcement officers have anything to contribute to federal antitrust litigation, do so many states hire private counsel to sue in their behalf? Unless the purpose of this title is to provide such private counsel with the unconscionably large fees that they have obtained when they represented states, should not the bill make clear that any private lawyer retained by a state as "special counsel" be compensated on the same basis as the state attorney general, with contingent fee arrangements specifically prohib-

ited? Let us not forget that the initial spade work is done by the Federal Antitrust Division at federal expense and that the states base their actions on the federal complaints. If *parens patriae* litigation is intended for the protection of consumers, let not the cream be skimmed off for the benefit of special counsel.

I would be remiss if I did not comment briefly on the amendment to S. 1284 recently proposed by Senator Bayh. The first section makes it a felony, punishable by a fine of up to $1-million and three years imprisonment, for any person to engage in undefined criminal or fraudulent conduct with the specific intent of excluding or contributing to the exclusion of another from any commercial activity, irrespective of whether the conduct has any impact on competition generally or any impact on the target of the exclusionary conduct specifically.

This proposal was prompted, according to the Senator, by "recent court decisions" requiring proof of a relevant market and a "dangerous probability" of monopolization in attempt cases under Section 2 of the Sherman Act. I respectfully suggest that the "dangerous probability" requirement is not new at all, but finds its genesis in Justice Holmes' landmark opinion in *Swift & Co.* v. *United States*—written seventy years ago.[1] I also take issue with the statement that the "better view" of the law is expressed in *Lessig* v. *Tidewater*. I can cite this Subcommittee chapter and verse to opinions in virtually every other circuit repudiating *Lessig* as bad law and requiring a "dangerous probability" of success as well as a delineation of the market attempted to be monopolized.[2]

This measure, in my view, comes dangerously close to punishing someone for his intent rather than for the unlawful consequences of his conduct. We should be mindful that we are talking here of a criminal violation and a felony to boot. Justice Holmes spoke specifically to this problem in *Swift*, when he stated: "Not every act that may be done with intent to produce an unlawful result is unlawful or constitutes an attempt. It is a question of proximity and degree." [3] And yet this bill would do away completely with the elements of "proximity and degree" and impose criminal sanctions wholly disproportionate to the actual effect of the undefined conduct which is being condemned.

What is more, as the courts have recognized, the "dangerous probability" requirement is dictated by "common sense." As one court recently put it, "[w]ithout the element of dangerous probability, courts would wander down avenues of *de minimis* significance." [4] I might add that Professor Turner of Harvard, formerly head of the Antitrust Division, recently delivered a speech at the New York City Bar Association where he addressed himself to this very question and concluded that, on balance, the "dangerous probability" formulation made good sense.

The impact of this measure on the administration of our judicial system could be devastating. I must assume that every person allegedly injured by such a violation would be entitled to sue for treble damages under Section 4. Since, under the proposal, the effect on competition and the degree of defendant's market power are irrelevant, and specific intent alone is the critical factor, none of these cases will be susceptible to summary disposition and virtually all will have to go to trial, accentuating the present judicial crisis even further.

The second section of Senator Bayh's amendment—requiring any corporation guilty of a Sherman Act violation to forfeit to the United States Treasury 20 percent of its gross revenues during the period of such violation—leaves me quite speechless.

The bill is not limited to hard-core, *per se* violations—it requires a 20 percent forfeiture regardless of how trivial or obscure the offense and regardless of how insignificant its effect on competition. In other words, the amount of the penalty has no relation whatsoever, proximate or otherwise, to the consequences or severity of the offense. Moreover, revenues are automatically forfeited, whether or not they were secured by reason of the violation. Congress has just increased the penalties for antitrust violations. Three-year prison terms are now in the cards for any antitrust offender. A wrongdoer also runs the risk of substantial, if not devastating, liability in treble damage actions. Do we really need an additional penalty at this time, particularly one of this magnitude?

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[1] 196 U.S. 375, 396 (1905).

[2] *E.g.*, *George R. Whitten Jr., Inc.* v. *Paddock Pool Bldrs., Inc.*, 508 F. 2d 547, 550 (1st Cir. 1974); *Agrashell, Inc.* v. *Hammons Prdts. Co.*, 479 F. 2d 269, 284-87 (8th Cir. 1973); *Mullis* v. *Arco Petroleum Corp.*, 1974-2 Trade Cas. ¶ 75,180 (7th Cir. 1974); *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F. 2d 203 (5th Cir. 1969); *White Bag Co.* v. *International Paper Co.*, 1974-2 Trade Cas. ¶ 75,188 (4th Cir. 1974).

[3] 196 U.S. at 402.

[4] *Varney* v. *Coleman Co., Inc.*, 1974-2 Trade Cas. ¶ 75,356 at p. 98,135 (D. N.H. 1974).

I would like to conclude my remarks where this bill begins—with Title I, the "Declaration of Policy." I fully agree with Section 102(a)(1) on the importance of the private enterprise system and the free market economy. Nor do I have any quarrel with the policy set forth in Section 102(b). What gives me pause are the other so-called "findings" in Section 102(a). My understanding is that findings by the Congress are supposed to be based on clear and convincing evidence. The fact that Congress declares that the moon is made of green cheese does not establish this as the fact. In my experience, the facts do not support the findings in the Declaration. Take, for example, the "finding" that increased concentration has contributed to our high rate of inflation. I have recently had occasion to study the scholarship in this area and I can state, without qualification, that there is a complete lack of unanimity among economists as to whether concentration has any impact on inflation whatsoever. A 1969 study by the Department of Justice concluded that concentration may, indeed, dampen inflation. Attorney General Levi, at his confirmation hearings, made a similar observation. There was the sharpest divergence of opinion on the question at a conference of economists sponsored by the Council on Wage and Price Stability in April.

If the evidence supporting the "findings" in Section 102(a) were subject to the kind of judicial review that our system creates for the examination of facts found by a trial court, I have not the slightest doubt that they would be set aside as clearly erroneous and without foundation. Findings which are nothing more than hyperbolic rhetoric serve no useful purpose either in the legislative process or in subsequent judicial review.

I have brought with me copies of a paper that I delivered on April 5th as part of the law alumni symposium at Columbia University Law School and which will shortly be published. This paper deals not merely with the narrow topics that I have discussed, but with other aspects of pending antitrust measures that are now being considered by both the House and the Senate. In the hope that what I have written may provide some enlightenment, I am submitting a handful of copies to the members of the Subcommittee, leaving in its discretion whether it would care to have my paper included in the record as an annex to my remarks here today.

Members of the Subcommittee, I have spent almost five decades of my life in the vineyards of antitrust. I have participated, either professionally or in my scholarly work, in every important antitrust development in the past fifty years. My experience has not been limited to any one side. I have represented both plaintiffs and defendants in antitrust litigation of the most complex and historic proportions. I have worked closely with the Antitrust Division in the past. I have taught the subject for forty-five years at Columbia and have written and lectured extensively on virtually every aspect of antitrust and its enforcement. As I stated on another occasion, when I appeared before Representative Rodino's Subcommittee, I feel very much as though I have walked into a lions' den. It is not very pleasant to give testimony that runs counter to the views of many members of the Subcommittee. It is much more conducive to a quiet life to hold one's peace and avoid open criticism of another's handiwork. I fully share this Subcommittee's belief in the free market and the beneficence of free and open competition. I believe with you in vigorous and effective enforcement. However, the means you are proposing will in my opinion turn out to be counter-productive and to injure the country to which we all owe so much. For these reasons I am constrained to voice my firm opposition to the provisions of the bill which I have discussed.

Mr. SHAPIRO. Mr. Chairman, may I first express my appreciation for the opportunity——

Senator HART. Well, let me welcome you first and identify you for the record.

Mr. SHAPIRO. Thank you. I will express my appreciation even more after a welcome.

Senator HART. The committee is appreciative of your willingness to switch your schedule and to share with us your expert appreciation of the problems that are reflected in civil antitrust cases.

We welcome Mr. Jerome Shapiro.

STATEMENT OF JEROME G. SHAPIRO, PARTNER, HUGHES, HUBBARD & REED, NEW YORK, N.Y., ON BEHALF OF BRISTOL-MYERS CO.

Mr. SHAPIRO. Thank you, Senator. I do want to express my appreciation for your welcome and for the opportunity to present my views, on behalf of Bristol-Myers, concerning title IV, the parens patriae provisions.

My understanding is that these provisions have basically two objectives. The first objective is the objective to deter violations of the antitrust laws that would have their effect upon vast numbers of individual citizens, residents of various States, in amounts so small in each claim that there would be a lack of incentive to private enforcement through treble damage actions under section IV of the Clayton Act.

I would suggest that that is probably the first and principal objective of the legislation.

The second objective that I see is a general feeling that it would be advisable to deprive those who violate the antitrust laws in those ways of the fruits of their illegal conduct. The means that is sought to implement these objectives in the parens patriae provisions is to try to provide literal compensations to the vast numbers of individuals who would be injured by the type of violation involved, and failing that, to distribute the funds that would otherwise be attributable to the violation to the State and to various general welfare purposes of the State.

I think the bill recognizes that it is impracticable to really apply a literal compensatory mechanism. The escheat provision and the general welfare provision will undoubtedly apply to the lion's share of any funds that might be recovered through a parens patriae action.

And that is, of course, historically and logically supported in the tetracycline settlement, for example, where there was an actual settlement fund set up, where all that needed to be done was to claim—where there was nothing litigable.

There were 40,000 claims made on behalf of individuals out of potential millions, and this was after there had been quarter-page advertising in newspapers in English, Spanish, and Japanese; after Ralph Nader had gotten on television on the Today Show and sought to advance the cause of claims; after the television and radio networks had provided, as public service spots, advertising of the availability of these claims; after Congressmen had made an effort to notify constituents of the availability of these claims; still there were 40,000 claims out of a total of millions.

Now, Senator, I suggest, therefore, that if the objective is deterrence and if the objective is deprivation of fruits, that there are more direct and more appropriate methods of achieving these objectives than the indirect and, in my view, unsuccessful methods of providing—or trying to provide—literal compensation to millions and millions of people.

For purposes of analysis, I would suggest that we consider three types of case. The first would be the type of case where there was a price-fixing conspiracy, but where there was a middleman between the price-fixers and the individual consumers.

I would suggest a second type of case, where the conduct involved was not price-fixing at all, but was exclusionary conduct, conduct of monopolization, conduct of conspiracy to injure competitors, that kind of conduct.

The third type of case I would suggest would be the type of case where there was a price-fixing conspiracy where the goods were sold directly by the price-fixers to the individual consumers.

As to the first two types of case, the one where there is a middleman, and the one where the only conduct involved is exclusionary conduct, I suggest that the law already provides for both of the objectives that this legislation appears designed to meet.

Thus, for example, price fixers selling to retailers, the middlemen, and exacting an illegal overcharge, would be subject to a treble damage action for every dollar of overcharge by those middlemen, and in amounts that would be substantial enough to provide incentive for individual assertion of claims under section 4 of the Clayton Act.

As to the exclusionary conduct type of case, I suggest that the measure of damages there by plaintiffs would be the measure of destroyed businesses times three.

The excluded competitor, the competitor injured by the illegal conduct, would assert and prove the amount by which he was injured, multiply it by three, and get a reasonable attorney's fee.

So I suggest there, Senator, that the deterrence exists, and the deprivation of fruits exists; indeed, I suspect that the recovery there would frequently exceed any retained fruits of exclusionary conduct.

The third type of case is the one that really is being sought to be addressed by this statute; that is, the case of the direct purchaser at a price-fixed price.

Now, the direct purchaser at a price-fixed price does require some kind of mechanism to provide the deterrence and to provide the deprivation of fruits.

And I would be very happy, after my opening remarks, if the Senator wishes me to, to discuss legislative possibilities in that regard that would have the effect of accomplishing the ultimate purpose of the legislation being proposed here, but without what I regard as the unhurdleable obstacles that this legislation would provide.

Title IV purports to deal with all three of those kinds of cases that I have mentioned, and, in doing so, there are created legal and constitutional obstacles as well as practical ones of very substantial proportions.

The four principal ones—and I will try to deal with them each as briefly as I can—are, first of all, the problem arising from injury to business or property being the gravamen of the cause of action under section 4 of the Clayton Act.

The legislation being proposed does not purport to change injury to business or property as the central element, substantive element, of a section 4 case.

The second problem is involved in the pass-on, which arises from the *Hanover Shoe* case. The third is the question of standing that was alluded to in my prepared statement as being a causal problem. The language of section 4 which requires that the injury be related causally to the illegal conduct is the problem involved in the standing issue.

And the final question is the question of what happens in an exclusionary conduct case under title IV where there is no individual consumer, in my view, involved in the recovery.

First, let me talk about injury to business or property, which is the gravamen of a section 4 case whether title IV is passed or not.

Injury to business or property under *Eisen III*, which is the case decided by the Second Circuit, which has been substantiated and reaffirmed by the Ninth Circuit, and which, in my view, is mandated by the Supreme Court in the *Zahn* case, requires individual proof of injury to business or property irrespective of what happens with respect to damages.

Injury to business or property is a substantive element of a cause of action under section 4 of the Clayton Act, and therefore, it stands on the same footing from the standpoint of the requirement of individual presentation, as does the jurisdictional amount requirement in the diversity case.

They are identical in legal concept. And the demonstration that they are identical in legal concept is that (i) in the *Zahn* case, where the Supreme Court decided that every individual, whether named or unnamed, who was a member of a class in a diversity of jurisdiction case, had to show individually, the $10,000 jurisdictional amount, the Court cited *Snyder* v. *Harris* as authority—*Snyder* v. *Harris* was the predecessor decision in the Supreme Court, which said that named plaintiffs in a diversity case had to prove individually the jurisdictional amount—and (ii) in the *Eisen III* case, the Second Circuit also relied on *Snyder* v. *Harris*, not on a question of jurisdictional amount, but on a question of whether injury to business or property could be cumulated, or had to be separately proven as to every named and unnamed member of the class.

And the Court of Appeals for the Second Circuit decided that it did not have to be separately proven as to each named and unnamed member of the class.

So the statute, as now envisaged, would not cure that, and the manageability problem, which is sought to be cured by the aggregating damage provisions would remain, because it would not cure the requirement for individual proof as to a substantive element of the cause of action. Indeed the *Eisen III* court stated that aggregating damages in such circumstances would violate due process.

Now, there is one other aspect to that that I would like to mention before moving to the pass-on. If you do have a requirement of injury to business or property that needs to be separately proven, the question will come as to what would be the res judicata effect under *Hansberry* v. *Lee*, if there were conflicting approaches to injury to business or property by the State attorney general representing members of both conflicting classes in the same lawsuit.

In *Hansberry* v. *Lee*—and I will allude to this several other times—the Supreme Court held that dual and potentially conflicting interests deprive the judgment of res judicata effect as to the nonpresent members of a class that were represented by somebody with a dual or conflicting interest.

Now, let me say a word about the passing-on defense. And this is a very current subject because just yesterday the chairman of the FTC made a very important speech—I believe it was important, I

know he made it—before the American Advertising Federation Annual Convention and Public Affairs Conference at the Statler Hilton, which reads directly on the pass-on problem.

And the pass-on problem is not one that can be resolved by some of the suggestions that the Senator heard today about having only natural persons represented by a State attorney general or having only natural persons in the position or status of individual consumers so represented.

The pass-on question is this: In the *Hanover Shoe* case the Supreme Court said that where somebody, as the result of an illegal overcharge, paid more than he otherwise would have paid, he is entitled to recover, as damages, three times the amount of that overcharge.

But it was also said, and of course it is implicit in *State of Hawaii*, that there may not be duplicating recovery, and that in the event that that purchaser passed on the illegal overcharge to his customer pursuant to a cost-plus contract or some similar arrangement, that not the direct purchaser, but rather his purchaser—his customer—would have the cause of action and would be able to assert it in a section 4 damage case.

This is a real conflict. This is not an imaginary conflict. This is a real conflict now in the courts between representatives of classes of direct purchasers and representatives of classes of indirect purchasers, people down the chain of distribution; it is a real conflict. And the State attorney general would be in the position of arguing both sides of that question.

Now, Commissioner Engman's statement raises it this way: He said that, as a specific example, in a survey done by the North California Pharmaceutical Association in the San Francisco area, it was shown that 100 tablets of Raudixin, a high blood pressure remedy, were for sale at 28 different prices, ranging from $2.50 to $11.75. Now, where does that fit into the pass on?

Well, the retail pharmacists would contend—and they are doing this now in litigation—these would be one set of clients of the Attorney General—that they kept the benefit of any reduction in price.

In other words, if they did not sustain an overcharge, but bought it at a lower price, they would, nevertheless, have sold it at a higher price to their customer. They would have kept the benefit of the lower price.

Therefore, the retail pharmacists argue they are entitled to be compensated for the detriment of the higher price. The consumer, the individual consumer, has charged, and this position was accepted at one time, in the *Tetracycline* case Judge Wyatt accepted this in principle, that the retailer merely acts as a conduit to the individual consumer, because he has a fixed pass-on; he has a fixed cost-plus arrangement, in effect, with the consumers, and simply marks up on the basis of his cost, irrespective of what elements there are in that cost figure.

Well, what Commissioner Engman said would appear to belie that, at least with respect to a substantial number of retailers; these people were not on a fixed markup on cost, because presumably they were all buying at approximately the same cost, yet charging widely diverged prices.

So there is a real conflict there, the Attorney General would be representing both sides of the conflict and under *Hansberry* v. *Lee*. who knows what that judgment would mean after it came down?

So I pass the pass-on now, and move to standing. Now, the standing question is also a question with some of the same overtones as the pass-on question.

The standing question is this: Section 4 of the Clayton Act provides that people may recover, for treble their injury, if their injury was caused by illegal conduct.

The question is: Where does the chain of causation end? It is a related question. It is like the pass-on. Where does the chain of causation end?

Now, there are three theories abroad in the courts these days. One of them is that nobody can recover where there was an intermediate purchaser. In other words, the direct purchaser has the cause of action. The indirect purchaser is too far away causally to recover.

Now, I make no judgment as to whether that is a sound or an unsound view, but it does exist in the courts.

The Second Circuit takes the view that there should be defined, a target area of competition that is calculated to be effected by the illegal conduct, and anybody in that target area may recover.

In the Ninth Circuit they deal with the target area concept in words, but actually it is more a foreseeability test.

I suggest that the individual consumer, under the first two tests, does not have as good a chance, certainly, as the direct purchaser does, and probably has little chance of recovery.

The chances are that the indirect purchaser does not have a cause of action and the Attorney General, therefore, would end up with his client, the intermediate businessmen, having whatever cause of action there was, and the ultimate consumer having no cause of action at all, under the present structure of the bill.

With respect to cases involving exclusionary conduct—I think that under the *GTF* case in the Second Circuit, and under the *Hanover Shoe* case, and I have analyzed both cases in my prepared statement [1]—under those cases, in addition to all the pass-on questions, in addition to all the standing questions, that it would finally be resolved that only the excluded competitor has a cause of action in exclusionary conduct cases.

Therefore, under the structure of the bill, the situation where the individual consumer purchases directly from the price fixer is the only case, in my view, where the individual consumer will end up with a cause of action under the antitrust laws.

In order to accomplish that, this very convoluted structure is indulged in, which is bound to raise the problems of constitutional import as well as of practical and legal import in the courts in the years to come, along the lines set out in my prepared statement.

Before concluding, I would like to make one observation from a philosophical standpoint. There appears to be an inarticulate major premise in the bill—to use Justice Holmes' phrase—that a punitive response should b made to the conduct of businessmen as it now exists in the world in the United States particularly.

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[1] Prepared statement appears on p. 316.

I believe that this punitive response is an unjustified response and that what is created is a financial exposure so great that in Judge Henry Friendly's words, "it might ruin innocent stockholders or what is more likely, produce blackmail settlements." That's in his little book. He wrote a little book and on page 120 that quotation appears. His book is called Federal Jurisdiction—A General View.

Now, I say this is not justified, Senator, because all violations of the antitrust laws are not clear-cut, deliberate, secret backroom price-fixing conspiracies designed to injure individual consumers.

I was involved in an antitrust case in this jurisdiction, in the District of Columbia, some years back, and the defendant in that case was the Packard Motor Car Co. The case was called *Webster* v. *Packard*.

In that case, the Packard Motor Car Co. had reduced the number of dealers, Packard dealers, in Baltimore from two to one. And the terminated dealer sued Packard Motor Car Co.

The defense was that Packard had tried to reorganize its situation in Baltimore in such a way that it would be able to compete more effectively with Cadillac and Lincoln and the high-priced cars.

A District of Columbia jury heard the case and before that jury there was presented evidence of different kinds; economic evidence, statistical evidence, evidence of a very esoteric nature, I might say.

And the issue to the jury was whether it was more important from a public standpoint that there be competition between two Packard dealers, on the one hand, or more important in the public interest that there be competition between a single strong Packard dealer and Cadillac, Lincoln and Chrysler, on the other hand. That was the issue.

The jury considered the esoteric evidence and came up with the conclusion, through its verdict, that it was more important that there be competition between the two Packard dealers than between Packard and the other makes of cars.

This was reversed by the Court of Appeals in the District of Columbia Circuit. And I do not say this with any particular outcome in mind, I simply say it to point out that the kind of decision that was made by the Packard Motor Car Co. to reduce its dealers from two to one and thus be able, more effectively, to compete with other makes of cars is not the kind of decision, right or wrong, that should evoke a punitive response.

This case took place prior to 1966, prior to rule 23, prior to any talk of title IV, but I suggest to you that title IV would cover this kind of case. And title IV would provide the kind of financial exposure in exactly the same qualitative magnitude as would a vicious backroom, secret, deliberate, code-using, price-fixing conspiracy.

I suggest that this is wrong. I suggest that this subcommittee should consider other ways of seeking to accomplish the objectives which I believe to be sound, that the subcommittee is seeking to accomplish.

I would just add one slight gloss, and that is, that in those days, the kind of exposure that is inherent in title IV might well have meant, in those days, the difference between solvency and insolvency of that motor car company, that old U.S. corporation.

Senator HART. Mr. Nash.

Mr. NASH. As I understand the gist of your statement, Mr. Shapiro, you do support the need for an effective deterrent against violations of the antitrust laws and, in fact, you go on to suggest some type of

quasi-civil penalty proposal which you offer to flesh out, but which is not fleshed out in your statement. But, with respect to title IV, you believe that the complexity inherent in title IV presents insurmountable obstacles to effectively accomplishing the objective of an effective deterrent.

Is that essentially correct?

Mr. SHAPIRO. Yes. I think I would put it in a slightly different way. I think that I would say that the objectives of title IV are not capable, really, of being carried out by the provisions of title IV, but in the course of finding that out, we are going to expend tremendous amounts of judicial resources and other resources, and the matter is going to be in the courts for a long time. And there are other, better ways of trying to handle this problem than the proposed legislation.

Mr. NASH. As I read and try to understand each of the elements of your concern, I find most of them going back to the inherent problem of damage allocation and the inherent conflict of interest because the term "person," as defined in the antitrust laws, would include individual consumers and businessmen, including retailers, wholesalers, as well as other middlemen in the chain of distribution.

So for the purpose of the following questions, I would ask you to assume that title IV is modified so that "person" is defined to include "natural person" and not including individual proprietorships or other forms of business entities; and further, to assume that the notice provisions of title IV is modified to include the concept of rule 23 where, in certain circumstances, actual notice is required.

With those changes made in title IV, do you still perceive inherent complexities preventing title IV from obtaining its objective?

Mr. SHAPIRO. Well, let me answer that in two parts; first, I direct myself to the notice, which is the easier question—and incidentally, I would like to, if I may, Senator, you asked a question here as to the constitutional aspect—there is a constitutional element in notice. In the *Eisen* case, the Supreme Court articulated, following its previous decision in the *Mullane* case, the constitutional standards that needed to be applied in order for there to be due process in the notice.

The constitutional problem, Senator, in the adequacy or inadequacy of a notice provision is in the effect it has as a res judicata bar. If the notice is constitutionally substandard, then the people who did not see the notice, and therefore, did not opt out, would not be barred from relitigating the case because they would have been deprived of due process if they were.

So there is a constitutional content in the notice provision, obviously. If the notice provision were to take the same form as rule 23, which the Supreme Court has determined is within the constitutional standards, I would think that that part would be cured.

With respect to the other part of your question, I do not believe that you would remove the problem by removing the conflict in the particular case, because the conflict would continue to exist even though the attorney general would not be embroiled, himself, in both ends of the conflict.

For example, if I am right about passing on, the attorney general would have an empty bag in representing the individual consumers in an indirect purchase case. If I am right about standing, the attorney general would have an empty bag in an indirect purchase case.

The only case that really can be dealt with is, the case of the direct purchaser in a price-fixing case where there is no question of standing and there is no question of the price itself being charged being an illegal price.

And I suggest that to accomplish that, instead of providing an unworkable mechanism, to try to provide individual compensation to each of the millions of people, I would suggest a civil fine which turns the thing on its head and says that in a case where there had been illegal overcharges to individuals—and this would be direct—that the Federal Government has the cause of action to recover the retained overcharges; turn it around from injury to business property to a concept of unjust enrichment and put in the hands of the judge, a discretion to perhaps have double damages if you need a deterrent in a bad case, or a triple even if it were a really bad case, and turn that thing around and let there be that kind of civil fine, and that would go to the Federal Government, by definition; and if one were worried about the attorney general not enforcing it, I would suggest a supplementary qui tam type statute which would provide perhaps the State attorneys general with the power to sue ex rel. United States and retain a piece of any recovery for their effort.

This is what is done in the Internal Revenue situation, and it was discussed by Senator Proxmire in connection with the truth in lending legislation which was recently passed.

One other thing before I leave that; another piece of that would have to be changing the threshold in section 4 of the Clayton Act that there would not be duplicative causes of action, removing the small claim in effect from section 4 of the Clayton Act and turning it into a civil fine.

Mr. NASH. Let us try to parse out your concern about aggregate damages and the question of standing. You cited the *Hanover Shoe* case for the proposition of who is entitled to recover.

Is your construction and belief that individual consumers are not entitled to recover, under section 4 of the Clayton Act, if they are either indirect or final purchasers based upon a statutory construction of existing section 4 or a constitutional bar of that type of recovery?

Mr. SHAPIRO. The standing question, in the first instance, is a statutory thing. It is a question of interpreting the "by reason of" language in section 4 of the Clayton Act.

I suspect that there might be a due process question if one were to go far enough down a remote chain of causation, where you are taking money out of one person's pocket and putting it into another person's pocket without showing an adequate causal relationship between illegal conduct and the injury. I think there would probably be a constitutional question there.

Mr. NASH. In terms of price fixing, you would not see that as a remote causation factor, though, would you?

Mr. SHAPIRO. No, I think, in terms of price fixing, there would probably be the constitutional ability to take care of the first purchaser, if it could be shown that that first purchase involved a traceable kind of causal relationship.

In other words, I think that because of the way in which pricing is done on a retail level to the consumer, I do not believe that it is possible to trace the causal chain to individual purchasers. It would be almost

a no-fault insurance kind of a thing making one citizen injure another, where you say: "Well, there ought to be a recovery; I—the Congress—like this class better than that class," where there is no real nexus in causation for that selection, there might very well be a constitutional problem.

Mr. NASH. It is correct, is it not, that your construction and belief of what is appropriate under section 4 of the Clayton Act, has been rejected by the 9th Circuit in the *Western Asphalt* cases and by a number of District Court judges in, for example, *Bosch* v. *General Motors*, *Ampress Brick* and the *Master Key* litigation, all which related to standing under section 4 and the ability to trace damages and apportion damages between ultimate consumers and middlemen in the chain of distribution?

Mr. SHAPIRO. Well, Mr. Nash, there is no question but that there are different judicial decisions going in a number of directions and all that we lawyers can do is to try to—on the basis of Supreme Court decisions that exist and a judgment as to how the thing should go—determine what will ultimately prevail.

There are cases that go on both sides of this question. And I suggest to you, for example, that the 9th Circuit test of foreseeability is diametrically opposite to the 2d Circuit's test of target area in some cases, and there are several cases which are almost identical that have been decided in opposite ways by the 2d Circuit and the 9th Circuit, respectively.

That kind of conflict exists; it has not been resolved by the Supreme Court. All I can do is to try to predict which way I think it will go, and I think it will go the way of the 2d Circuit rather than the 9th Circuit.

Mr. NASH. But if title IV were enacted with the appropriate modifications, then those cases would, in effect, become moot and the courts would have to construe the new title IV, is that not correct?

Mr. SHAPIRO. Well, I think it depends upon what modifications you are talking about. I think, for example, that if you were to modify section 4 of the Clayton Act to change the concept from one of injury to business, or property to one of unjust enrichment, or something like that, that you would not be able to do it retrospectively, as the present statute would appear to seek to do. I think you might constitutionally be able to change it, but I don't think you would be able to have retrospective application.

I think that on that basis, as the *Eisen III* court said, where you have injury to business or property as the gravamen of the action, the kind of damage mechanism that is used in the title IV provisions is unconstitutional and, therefore, I would think that if one were going to change the injury to business or property requirement, change everything, that one could only do it prospectively and there would be constitutional problems in some ways of approaching that.

Mr. NASH. One final observation. As I recall the Supreme Court decision in *Eisen*, the court took the unusual step—at least I thought it was unusual—of vacating the entire opinion of the 2d Circuit in *Eisen III*.

Could you comment on the court's action?

Mr. SHAPIRO. Yes; I can comment on that. I think it is merely a procedural device because the Supreme Court said, in very specific

language "We are not reaching the manageability question". They could not have meaningfully vacated unless they had reached the manageability question.

Mr. NASH. I have no further questions, Mr. Chairman.

Senator HART. Mr. Chumbris.

Mr. CHUMBRIS. Thank you, Mr. Chairman, I have no questions.

Senator HART. Thank you for a very interesting presentation.

Mr. CHUMBRIS. On behalf of Senator Hruska, who had to leave, he does appreciate your coming in and the excellent statement you gave us.

Mr. SHAPIRO. Thank you.

[The prepared statement of Jerome G. Shapiro follows. Testimony resumes on p. 325.]

PREPARED STATEMENT OF JEROME G. SHAPIRO, A MEMBER OF THE NEW YORK BAR, ON BEHALF OF BRISTOL-MYERS COMPANY

INTRODUCTION

I appreciate the opportunity to appear before the Subcommittee to present my views with respect to Title IV of S-1284 on behalf of Bristol-Myers Company. That company has been engaged in litigation, as have many United States companies, in which the issues I propose to discuss today are relevant. However, I speak not only from that perspective, but also from the perspective of a trial lawyer who has been engaged for over two decades in antit ust practice.

Let me start by recognizing expressly that the policy of the antitrust laws to foster and preserve free forces of competition in the United States is a sound and viable policy. The economic premise of our society is that permitting the free forces of competition to prevail is the most effective way to promote the economic health and strength of our system.

One of the ways of effectuating antitrust policy under our system is to encourage enforcement by others than the United States, by providing a cause of action for compensation. However, the compensatory features of the antitrust laws are not for the purpose of providing compensation to everyone whose injury is conceivably traceable to an antitrust violation.[1] Rather, the compensatory fea ures of the antitrust laws are aimed at providing the necessary incentive to anyone injured in his business or property by anticompetitive acts[2] to sue to enforce the antitrust laws. These provisions are a supplement to the substantial criminal[3] and civil enforcement remedies available to the agencies of federal government. To provide incentive for private enforcement, the antitrust laws give treble damages and reasonable attorneys' fees to private litigants. The existence of these incentives also acts as a deterrent to potential antitrust violators.

Under the statutory system originally envisaged, even a relatively small claimant could be expected to sue for treble damages, since no minimum jurisdictional amount is required and his attorney has a promise of adequate compensation. The amount of the reasonable attorneys' fee provided in Section 4 of the Clayton Act is not limited by the amount of recovery.

However, the *parens patriae* provisions of S-1284 appear to be premised on the belief that the antitrust laws, as presently implemented through available procedures, have proven inadequate in the area of small claims. Those proposed provisions appear to have as their objectives (i) the deterrence of large-scale violations of the antitrust laws which may injure large numbers of citizens in a relatively small amount per citizen, and (ii) deprivation of the antitrust violator of the "fruits" of his illegal conduct in such cases. The means chosen to achieve these objectives is to attempt to facilitate recovery of damages by such citizens.

These objectives are grounded on sound public policy. However, the proponents of the bill have chosen a means that cannot, in my view, achieve the objectives sought. Instead, the means would be subject to substantial existing and new legal obstacles.

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[1] As the Supreme Court said in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263, n. 14 (1972):
"The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. * * *"

[2] *GAF Corp. v. Circle Floor Co.*, 463 F. 2d 752, 757-58 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973).

[3] In 1974, the antitrust laws were amended to provide that a criminal violation be deemed to be a felony, to increase fines from $50,000 to $1,000,000 and to increase prison terms from one to three years.

A proper legislative solution avoiding these obstacles may well be t- create forthrightly a new cause of action on behalf of the United States government itself, in order to achieve the objectives of deterrence and deprivation of "fruits" without engendering the enormous difficulties inherent in the *parens patriae* provisions of S-1284.

While I am prepared to discuss suggestions for appropriate legislation should the Chairman wish me to do so, I will confine this statement to a discussion of some of the problems inherent in an attempt to collect millions of small claims as a means of achieving the objectives sought.

DISCUSSION OF TITLE IV

For purposes of this discussion, it will be assumed that, with the possible exception of proposed Section 4C.(a)(2) concerning damages to the "general economy" of a State, Title IV is not intended to alter the substantive requirements of Section 4 of the Clayton Act ("Section 4"). Thus, it will be assumed that injury to the business or property of a plaintiff would continue to be the gravamen of a damage action under Section 4 despite passage of Title IV. To put it another way, it is assumed that Title IV is not intended to provide a statutory modification of any existing judicial determination that damages awarded under Section 4 must be based upon proven injury to the business or property of the plaintiff claiming damages, rather than upon unjust enrichment of the defendant.

It is also assumed, for purposes of this discussion, that Title IV is not intended to result in duplicative recovery by various plaintiffs or types of plaintiff asserting causes of action for damages under Section 4.

I. Injury to business or property—manageability and constitutional problems under section 4C.(a)(1) and 4C.(c) of title IV

Title IV would permit a state attorney-general to assert causes of action as *parens patriae* either directly on behalf of persons residing in his state or as representative of a class of such persons, who have been "damaged." Whether the assertion were direct or representative, it certainly would be multiplicitous. Accordingly, in such multiplicitous suits considerations of "manageability" would be of importance whether or not the action were technically under Rule 23 of the Federal Rules of Procedure.

It is obvious that by providing in proposed Section 4C.(c) for aggregation of damages, and distribution of damages on the basis of a reasonable exercise of discretion, it is intended that Title IV eliminate "manageability" questions with respect to such multiplicitous claims. However, making proof of damages "manageable" does not make the case "manageable" if another critical element of the case requires separate, individual proof. In my view, that would be the situation here.

I believe that even under Section 4C.(a)(1), the substantive requirement of proof of a damage plaintiff's injury to business or property under Section 4 would result in separate, individual proof at trial of that element, as to each plaintiff's claim.

The Courts of Appeals for the Second and Ninth Circuits have held that individual treatment must be given to such claims of injury to business or property under Section 4, and as far as I know, no United States circuit court has held to the contrary. In *Eisen III*,[4] the Court of Appeals for the Second Circuit said (479 F.2d at 1014):

"The applicable substantive law is *Section 4 of the Clayton Act* that authorized the private triple-damage antitrust suit to recover damages by a person who has been '*injured in his business or property*' by reason of a violation of the antitrust laws. That the claims of many *may not be treated collectively* or as 'the class as a whole' is what the Supreme Court decided in Snyder v. Harris, 394 U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969), where plaintiff, in a *diversity case* sued as representative of a class of some 4000 shareholders of an insurance company. Her individual claim was for *less than $10,000*. She was *not permitted to aggregate* her claim with the separate claims of the other *members of the class* which amounted to $1,200,000. Despite the fact that amended Rule 23 was already in effect, the case was dismissed. Moreover, in the recent case of Hawaii v. Standard Oil Co. of California, et al., 405 U.S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972), it was again held that only persons *actually injured* in their business or property *could claim* damages under the Clayton Act." (Emphasis supplied.)

[4] *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973).

See also, *In re Hotel Telephone Charges*, 500 F. 2d 86 (9th Cir. 1974); *Kline v. Coldwell, Banker & Co.*, 508 F. 2d 226 (9th Cir.), *cert. denied*, 43 U.S.L.W. 3601 (May 12, 1975).

It is not unlikely that when the Supreme Court reaches this issue, as it one day undoubtedly will, it will uphold the concept expressed in *Eisen III* that injury to business or property in a multiplicitous damage action under Section 4, such as the *parens patriae* claim under Section 4C.(a)(1) of Title IV, must be separately litigated as to each claimant.

In *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the Supreme Court held that each member of a class, whether or not named as a party in the action, must separately satisfy the jurisdictional requirements of his action. In *Zahn*, which was a diversity case, the element in issue was the amount in controversy, which had to be $10,000 per plaintiff. The Supreme Court upheld the decision of the courts below refusing to permit the suit to proceed as a class action. In so doing, the Supreme Court said (414 U.S. at 301):

"We conclude, as we must, that the Court of Appeals in the case before us accurately read and applied *Snyder* v. *Harris* [394 U.S. 332 (1969)]: *Each plaintiff* in a Rule 23(b)(3) class action must satisfy the *jurisdictional amount*, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.' *Zahn v. International Paper Company, supra*, 469 F. 2d, at 1035." (Emphasis supplied.)

Whereas *Zahn* was a diversity case where the jurisdictional amount was a threshold question for a plaintiff, and whereas Section 4 does not have any such jurisdictional-amount requirement, Section 4 nevertheless provides a threshold substantive requirement that a plaintiff have sustained an injury to his business or property. Accordingly, the same requirement of individualized proof will undoubtedly be required.

It is significant that both the Court of Appeals for the Second Circuit in *Eisen III*, and the Supreme Court in *Zahn*, relied on *Snyder v. Harris* in reaching their respective conclusions. *Snyder v. Harris* was a case in the Supreme Court holding that each *named* member of a class in a diversity case must satisfy the jurisdictional-amount requirement. In *Zahn*, the Supreme Court, relying on its previous decision in *Snyder v. Harris*, held that each *unnamed* member of a class in a diversity case must *also* satisfy the jurisdictional-amount requirement. In *Eisen III*, the Court relied on *Snyder v. Harris* in holding that in a case under Section 4, each named and unnamed member of the class must individually establish injury to his business or property.

Aggregate treatment of damages, as provided in proposed Section 4C.(c) of Title IV, also poses a substantial constitutional problem at least as long as injury to the business or property of the plaintiff remains the substantive gravamen of the Section 4 damage claim.

In *Eisen III*, the Court held that it would be a violation of the constitutional guarantee of Due Process to allow aggregate *damages* to be assessed under Section 4 with respect to a class as a whole, rather than requiring individual proof of damages under Section 4 by individual members of a class. The Court said (479 F. 2d at 1018):

"Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an *unconstitutional violation of the requirement of due process of law.* But as it now reads amended Rule 23 contemplates and provides for no such procedure. Nor can amended Rule 23 be construed or interpreted in such fashion as to permit such procedure. We hold *the 'fluid recovery' concept and practice to be illegal,* inadmissible as a solution of the manageability problems of class actions and wholly improper." (Emphasis added.)

Yet is is almost precisely the same procedure for assessing damages as the Court spoke of in *Eisen III* that is provided for in Section 4C.(c) of Title IV.

Thus, *Eisen III* held that (i) injury to business and property must be separately proven under Section 4, (ii) damages must be separately proven under Section 4, and (iii) at least where injury to business or property is the gravamen of the action, it would violate Due Process to provide for aggregation of damages. Since Title IV would leave intact the Section 4 provisions requiring injury to business or property, and since Title IV would provide for aggregation of damages, the third holding of *Eisen III* would apply.

II. The anatomy of a price-fixing case under section 4C.(a)(1) of title IV

Let us suppose that charges of a price-fixing conspiracy with respect to a prescription drug were levied against several major pharmaceutical companies, and

that this resulted in an action by the Attorney-General of a State under the *parens patriae* provisions of Title IV.

First, let us see who the "persons" are who would be clients of the Attorney-General. Surely, he would represent individual consumers, who purchased pills from the retail pharmacists. He would also undoubtedly represent the retail pharmacists who purchased pills from the defendants or from wholesalers who had in turn purchased pills from the defendants. These retail and wholesale businesses would be either corporate enterprises, partnerships, or individually owned and operated businesses. The Attorney-General would also represent all public and private hospitals which may have purchased pills from the defendants and then resold them to individual consumers.

This diverse representation of different types of plaintiff would raise some very difficult problems which might well result in the individual consumer clients of the Attorney-General sustaining no recovery at all, while his corporate and business clients received whatever recovery there was. This would be a paradox, given the principal purposes of the proposed legislation; but in addition, these problems would, as I will explain below, have constitutional significance.

A. The passing-on problem

Where there is a ladder of distribution such as the one involved in the present hypothetical case, at each successive rung in the ladder the purchase price of the product is newly set and increased by an independent businessman. The manufacturer sells to the wholesaler, who sells to the retailer, and the retailer resells to the individual consumer. Or the manufacturer sells to a hospital which resells to the individual consumer.

If any of the potential plaintiffs is to recover, he must show at a minimum that he paid a price higher than he would have paid but for the illegal price-fixing conspiracy.

Therefore, the question which arises in considering who, if anyone, was injured in his business or property as a result of the manufacturer's illegal conduct, is whether any given purchaser absorbed an illegal overcharge, in whole or in part, or whether he passed it on to his customer. Where an initial sale to a wholesaler is followed by a sale to a retailer, and is then followed by a sale to an individual consumer, the question must be asked at both the retailer and individual consumer level. Each purchaser on the ladder of distribution in effect competes with each other purchaser for any recovery, because if any seller on the distribution ladder can maintain that he absorbed the entire "overcharge" and would have resold for the same price even if he had bought it cheaper, then the purchaser from that seller has had no injury to his business or property *caused* by the "overcharge" in the first sale.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494(1968), the Supreme Court held that a defendant may not defeat the claim of a purchaser from him, whom he has illegally overcharged, by saying that the purchaser in turn passed on the overcharge to *his* customer. However, the Supreme Court said that an exception to this rule would exist if the overcharged purchaser resold pursuant to a pre-existing cost-plus contract or similar arrangement. The reason for this was to avoid duplicative recovery. *See Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 264 (1972).

In *Donson Stores, Inc. v. American Bakeries Company*, 58 F.R.D. 481 (S.D.N.Y. 1973), the Court stated the *Hanover Shoe* principle this way (58 F.R.D. at 484):

"* * * Thus, *Hanover* stands for the proposition that *only the initial purchaser* from a price-fixing manufacturer may recover the overcharge *unless* he has made sales to subsequent purchasers pursuant to *cost-plus* contracts, in which event the original purchaser becomes a mere conduit for passing the cause of action to his customers." (Emphasis supplied.)

Thus, the question in our hypothetical case would be whether a wholesaler or retailer had a cost-plus contract or similar arrangement when he resold to his customer. This would determine whether the wholesaler *or* the retailer *or* the consumer had sustained injury to his business or property and thus had the cause of action as to which damages could be proved.

The passing-on problem highlights two basic difficulties inherent in the proposed bill.

First, despite the provisions of Section 4C.(c) concerning proof of damaage in the aggregate by statistical, sampling, or other methods, resolution of the passing-on problem would still require individual proof as to each claimant. This is be-

cause Section 4C.(c) is only concerned with determining *amount* of damages, and not with the separate and distinct legal element of whether a claimant suffered any compensable injury at all as a result of the alleged antitrust violations.

Second, because the antitrust laws define the term "person" as including both individual citizens and corporations, the Attorney-General would represent all these competing plaintiffs with their conflicting claims.[5] Also, if state public hospitals had purchased pills from the defendants and had resold them, as public hospitals do, to individual consumers who are patients or hospital employees, the Attorney-General would have to take on *their* behalf the same position that the retailers would want him to take on *their* behalf—both positions being to the exclusion of the individual consumer.

I can tell you from my experience that there is a real conflict in litigation between representatives of retailers, on the one hand, and representatives of individual consumers, on the other hand, as to which, if either, class has a cause of action. From my knowledge of the factual situation in the pharmaceutical marketplace, and from independent surveys conducted and published in newspapers and elsewhere, I must conclude that the retailer has a better argument than the individual consumer.

It is my view that the Attorney-General would, in our hypothetical case, be required professionally to present both sides of the question on behalf of two or more conflicting sets of clients. The Attorney-General would not be in a position to choose between clients and represent one only. Because of the advantages to a client represented by the Attorney-General, there would undoubtedly be constitutional implications in his selection of one resident or group of residents in his state over another, when he has the power and authority to represent both.

In such circumstances, constitutional principles might well prevent any judgment against the interest of individual consumers from having *res judicata* effect. Any absent member of the individual consumer class could, if dissatisfied with the outcome, relitigate the entire case. See *Hansberry v. Lee.* 311 U.S. 32, 44, 45 (1940).

Similar conflict situations with similar difficulties arise if the Attorney-General were to sue not only under Section 4C.(a)(1) but, at the same time, sue also under Section 4E with respect to a federally-funded state welfare program.

Under a typical program of that kind, the welfare patient may consult a state-employed doctor (or a state-designated private doctor) who prescribes the pill. The retailer fills the prescription and charges the state for it under the program.

The Attorney-General would then be representing retailers in the Section 4C.(a)(1) case and his own state in the Section 4E case. There would be a conflict between the two, the retailers claiming *they* were overcharged and should be allowed to sue for that overcharge, while the state would be contending that *it* was entitled to recover such overcharge because of the earlier reimbursement.

B. The standing problem

Similar difficulties will beset the Attorney-General as he is confronted with the question of whether his client, the individual consumer, as an indirect purchaser, has standing to sue under Section 4. Clearly, if the individual consumer does not have standing, the direct purchaser, the retailer or wholesaler, will keep in its entirety, with no allocation to individual consumers, any recovery for overcharges paid by him.

Once again, the Attorney-General has conflicting classes with the obligation to argue on behalf of each against the best interests of the other. Here, again, in my view, the individual consumer has the worse of the two arguments.

The problem arises from the requirement of Section 4 that a treble-damage plaintiff prove that he has sustained injury to his business or property *by reason of* anything forbidden in the antitrust laws. This is a causation requirement.

The question of "standing to sue", one of the most vexed questions in the antitrust field being considered by the courts today, concerns that requirement of causation.

Title IV does not in any way reach this threshold question as to the status of a treble-damage claimant as such; it deals only with the authority or power of the Attorney-General to sue on behalf of persons "who have been damaged". If the claimant lacks "standing", the question of the extent of his injury or the amount of his damages will never be reached, no matter who sues on his behalf.

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[5] The difficulties involved in limiting that definition of "persons" to "natural persons" or some similar definition for purposes of this statute are discussed in a separate point below.

A number of concepts have been articulated by various courts as appropriate shibboleths for determining the question. Under almost all of these concepts the indirect purchaser from a price-fixing defendant would be likely to lose.

In one analysis, it is held that a plantiff may recover only if his damages are directly caused by the conduct of the defendant, but not if they are indirectly caused by such conduct. This direct-indirect test has been stated by some courts in terms of privity between the plaintiff and the defendant. Thus, the question of whether an injury was direct enough to provide requisite standing to sue for damages has been said to turn on whether or not there was an intermediary between the plaintiff and the alleged antitrust violator.[6]

In another analysis, the test of standing to sue has been stated in terms of whether or not the plaintiff was in the "target area" of the defendant's conduct. This target-area test, as articulated in the Second Circuit, has been said to require the plaintiff to show that he is a person against whom the conspiracy was aimed, such as a competitor of the person sued.[7]

Still another analytical concept applied to the standing question has been stated, as in the Second Circuit, in terms of whether or not the plaintiff was in the "target area"; but, as articulated in the Ninth Circuit, the target area encompasses "that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry", and permits suit by plaintiffs foreseeably injured in that area.[8] In this test the Ninth Circuit applies its own subjective view of the boundaries of the targeted area.

Of these tests it is only the Ninth Circuit test that affords the individual consumer, or indirect purchaser, possible success on the standing issue. This would be on a foreseeability theory.

The great difficulty of the individual consumer's problem in the Second Circuit and the other circuits such as the Tenth [9] that share the Second Circuit's views, is elucidated in *GAF Corp.* v. *Circle Floor Co., Inc.*, 463 F. 2d 752 (2d Cir. 1972).

In that case GAF alleged that Circle Floor and certain individuals conspired to take over control of GAF, in violation of the antitrust laws. As part of the conspiratorial conduct, and to facilitate the takeover, it was alleged that Circle Floor had reduced its purchases of certain goods from GAF. GAF claimed damages for lost profits resulting from the reduction of purchases.

The Court dismissed this claim for damages on the ground that the violation of the antitrust laws alleged by GAF had *anticompetitive* effects that would be felt by *competitors* of GAF and Circle Floor, but *not* by GAF itself.

The Court said (463 F. 2d at 757):

"* * * If there has been a wrong, appellant *cannot show that it results from the lessening of competition.* Termination of employment will often occur whether a merger is legal or illegal. It is the natural effect flowing from two similarly structured businesses combining their assets to maximize efficiency. * * *"

"* * * The courts, in interpreting § 4 of the Clayton Act and its predecessor, have endeavored, although with some inconsistency and conflict, to promote the *policy of competition* established by the Sherman and Clayton Acts by interpreting § 4 as allowing treble damages *only* to those who have suffered some diminution of their *ability to compete.* * * *" (Emphasis supplied.)

That was not a price-fixing case, and the Court undoubtedly did not have price-fixing in mind. Possibly, that Court would say that a *direct* overcharge to a customer pursuant to a price-fixing conspiracy is recoverable on the theory that the act of charging an illegal fixed price, a *per se* violation of the antitrust laws, is an anticompetitive act in and of itself. However, the *indirect* price charged by the innocent purchaser from the defendant would be *consequential* at most, and not itself an anticompetitive act. In *GAF*, there was no question but that there was a *consequential* relationship between the illegal conduct of the defendants and the damages, but no recovery was permitted.

Thus, under both the present state of the law and under the proposed amendments, the Attorney-General would probably argue unsuccessfully that his

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[6] See, *e.g., Bray* v. *Safeway Stores, Inc.*, 1975 Trade Cases, ¶ 60,193, pp. 65,657, 65,665, Civil Action No. C–48538–OJC (N.D. Calif., February 26, 1975); *Midway Enterprises, Inc.* v. *Petroleum Marketing Corp.* 375 F. Supp. 1339 (D. Md. 1974).

[7] See, *e.g., Calderone Enterprises Corp.* v. *United Artists Theatre Circuit*, 454 F. 2d 1292, 1925 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

[8] See, *In re Multidistrict Vehicle Air Pollution, M.D.L. No. 31*, 471 F. 2d 122, 128 (9th Cir. 1973), *cert. denied*, 414 U.S. 1045 (1973); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, supra*, dissenting opinion, 454 F. 2d at 1303.

[9] See, *Reibert* v. *Atlantic Richfield Co.*, 471 F. 2d 727 (10th Cir.), *cert. denied*, 411 U.S. 32 (1973), where the court said (471 F. 2d at 731):

individual consumer clients and *all* of his retailer clients *have* standing, and he would end up with only wholesaler and direct-purchasing retailer clients, on whose behalf he *should* have been arguing that his individual consumer clients and his indirect-purchasing retailer clients *lack* standing.

III. The anatomy of an exclusionary-conduct case under section 4C.(a)(1) of title IV

Under the antitrust laws, it is illegal to exclude competition. If a company unilaterally acts to exclude competition, and reaches a point where it possesses monopoly power, the company has violated the provisions of Section 2 of the Sherman Act. If several competing companies conspire to put a competitor out of business, they have violated the restraint-of-trade provisions of Section 1 of the Sherman Act. This is in both instances exclusionary conduct, and if a plaintiff can show injury to his business or property "by reason of" that conduct, that plaintiff may recover damages under Section 4.

Let us suppose that three companies engaged in the business of manufacturing and selling soap are charged with a conspiracy to put a competitor out of business because he is a price-cutter. It is alleged that to achieve this end, the conspirators made use of their influence with suppliers to deprive the unwanted competitor of needed supplies. The three alleged conspirators have no agreement about pricing and they continue to compete with each other in their own sales to retail outlets throughout the period of time in which they are actively engaged in excluding their price-cutting competitor, and thereafter.

Clearly, the excluded competitor has a cause of action under Section 4 for three-times the value of his destroyed business. He could be a client of the Attorney General under the *parens patriae* provisions of Title IV.

However, the three co-conspirators, now defendants, may also be sued by the Attorney-General representing a class of supermarkets, grocery stores, drugstores, and other retail outlets, as well as a class of individual consumers. On behalf of these purchaser classes, the Attorney-General would allege that because of the exclusion of the price-cutting manufacturer, they were unable to buy his brand of soap at a cut-rate price. The Attorney-General would also allege that the soap products made by the defendant manufacturers, and also those made by manufacturers not even in the conspiracy, were all sold at prices higher than they would have been sold for if the price-cutter had still been in business, even though it might never have been sold for as low a price as the price-cutter's soap.

Thus, the Attorney-General on behalf of the various members of the retailer class would be claiming damages based upon (i) their purchases of soap from the defendants, (ii) their purchases of soap from other manufacturers entirely innocent of wrongdoing, and (iii) purchases of soap which the retailers would have made from the price-cutter, and the repurchases of such soap that would have been made by individual consumers, if the price-cutter had remained in business. One may assume that some of the retailers would ordinarily have stocked the price-cutter's brand if it had been available, and others would not because they did not like the quality or for some other reason.

On behalf of the members of the class of individual consumers, the Attorney-General would be claiming damages based on (i) purchases of soap from retailers who had purchased it from the defendants, and (ii) purchases of soap from retailers who had purchased it from other, admittedly innocent, manufacturers. Again, one may assume that some of the individual consumers would customarily have purchased the price-cutter's brand of soap of it had been available. Some of the individual consumers would not have purchased the price-cutter's brand of soap even if it had been available. Some of them purchased from stores that would have stocked the price-cutter's soap, and some purchased from stores that would not have stocked it in any circumstances.

Potential plaintiffs and clients of the Attorney-General here are every retailer and every individual consumer that purchased a bar of soap on any level of distribution and from any source in the entire state.

Every problem involved in the price-fixing case, including passing-on and standing, is present here. In addition, there is a further problem arising from the fact that there was no "illegal price" to begin with, containing some asserted element of overcharge, but rather a generalized complaint that all prices were higher than they otherwise would have been.

Where there is no "illegal price" and the only conduct complained of is exclusionary conduct, is it likely that the *only* client of the Attorney-General that has a valid cause of action is the excluded competitor. As pointed out above, the Court of Appeals for the Second Circuit in *GAF* held that *only* those who have "suffered

some diminution of their ability to compete" have a damage claim under Section 4. (463 F. 2d at 757) (As noted above, there may well be an exception to this where there has been a direct purchase at an illegally fixed price.) In the absence of price-fixing, under the teaching of *GAF*, *no* purchaser would have a cause of action. This, I believe, is also the teaching of the Supreme Court in *Hanover Shoe*.

There, when the case came to the Supreme Court for review, the following facts had been established:

(1) United *had monopolized* the shoe machinery market in violation of Section 2 of the Sherman Act by various means described in Judge Wyzanski's opinion in a related government action;[10]

(2) United had a practice with respect to certain important shoe machinery of leasing only, and refusing to sell, to shoe manufacturers such as Hanover (the "lease-only practice");

(3) Hanover desired to *purchase* from United the shoe machinery as to which United applied its lease-only practice;

(4) United refused, pursuant to its lease-only practice, to sell the shoe machinery to Hanover;

(5) if United had been willing to sell the machinery, Hanover would have paid *less* for it than it had to pay under the lease-only practice;[11] and

(6) because of the absence of alternative sources of supply,[12] Hanover was forced to lease the machinery from United at a rental price *higher* than a purchase price would have been.

Thus, United had unquestionably been found to be an illegal monopolist which had substantially eliminated competition in the shoe machinery market. United was in a position where it could make its shoe machinery available to customers at virtually any price it chose. When Hanover approached United for shoe machinery, United quoted a take-it-or-leave-it price in the form of rental for a lease. It refused to sell the shoe machinery to Hanover at a price which would have been *lower* than the rental charged. Because of the absence of competition, Hanover was forced to pay United the higher price precisely *because* United had eliminated alternatives. United's ability to exact the higher price from Hanover was clearly a consequence or effect of United's illegal monopolization.

Despite these circumstances, the Supreme Court held that Hanover *could not recover* treble damages unless it established, at the threshold, that Judge Wyzanski had found that United's exaction of the higher price was achieved by means of an "instrument of monopolization". In other words, the lease-only practice which resulted in the higher price was required by the Supreme Court to be an *illegal exclusionary* practice rather than a merely profitable one, in order to support a treble-damage action.

The Supreme Court said (392 U.S. at 484):

"* * * Hanover submitted the findings, opinion, and decree rendered by Judge Wyzanski in the Government's case as evidence that United *monopolized and that the practice of refusing to sell machines was an instrument of the monopolization*. United does not contest that prima facie weight is to be given to the judgment in the Government's case. It does, however, contend that Judge Wyzanski's decision did not determine that the practice of leasing and refusing to sell was an *instrument of monopolization*. This claim, rejected by the courts below, is the *threshold issue* in No. 463. If the 1953 judgment is not prima facie evidence of the *illegality of the practice from which Hanover's asserted injury arose*, then Hanover, having offered no other convincing evidence of illegality, *should not have recovered at all*." (Emphasis supplied.)

The Court found that the lease-only practice was an act of illegal monopolization and allowed recovery. Justice Potter Stewart dissented on the ground that he thought the lease-only practice was not illegal, as such. The entire Court agreed that if it was not illegal, as such, there would be no recovery.

Thus, the Supreme Court found unanimously that it was not enough, to sustain a treble-damage recovery, that exaction of a high price had been rendered possible by illegal exclusionary conduct. The practice *itself* (the transaction of sale) whereby the high price was exacted had to be illegal "as such".[13]

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[10] *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953).

[11] 392 U.S. at 487.

[12] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 245 F. Supp. 258, 287 (M.D. Penn. 1965), *aff'd*, 377 F. 2d 776, 781 (3rd Cir. 1967).

[13] This point was presented to Chief Judge Sirica in a motion on the pleadings against purchasers in the Ampicillin Litigation in the United States District Court for the District of Columbia. He denied the motion without opinion. However, in my view, particularly in light of *GAF*, this point of view should ultimately prevail.

Thus, under both *GAF* and *Hanover Shoe,* there is an entire area of antitrust—monopolization, attempted monopolization, and conspiracy to exclude or injure competitors—where the only clients the attorneys-general would have under Section 4C.(2)(1) of Title IV would be corporate or other business interests, in conflict with other corporate or business interests. I submit that this would not advance the objectives of Title IV and is not what the bill contemplates or should contemplate.

IV. Representation of "persons"

The definition of "persons" under the antitrust laws includes corporations. Thus, if a group of tool and die manufacturers for the automotive industry conspired to fix prices, the Attorney-General of the State of Michigan would have as his only potential clients the firms of General Motors Corporation, Ford Motor Company, Chrysler Corporation, and American Motors Corporation, among other members of the automotive industry.

This absurd result, putting attorneys-general in the position of representing business enterprises even in cases where there are no consumers involved at all, could not be avoided simply by changing the term used in Title IV to confine representation by attorneys-general to "natural persons". Retail operations and numerous other business enterprises are frequently natural persons engaged in business. This is often true of pharmacists, grocers, gasoline-station operators, small manufacturers, and many others. On the other hand, some individually owned and operated business are structured in corporate form.

Therefore, confining the definition of potential clients of attorneys-general to "natural persons" would not exclude business entities and would exclude individuals using the corporate form for their businesses.

V. The provision for notice in section 4C.(b)(1) of title IV

Section 4C.(b)(1) provides for a particular manner in which notice may be given in any action brought pursuant to Section 4C.(a)(1). This proposed amendment is of doubtful validity under constitutional principles and thus could not effectively negate the recent Supreme Court class action decision, *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974).

There the Supreme Court reiterated a statement it had made in an earlier case that notice by publication is difficult to justify and is a poor substitute for actual notice. The Court said (417 U.S. at 175):

"* * * The Court stated [in *Schroeder* v. *City of New York,* 371 U.S. 208 (1962)] that the 'general rule' is that 'notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable * * *.' *Id.* 212–213. The Court also noted that notice by publication had long been recognized as a *poor substitute for actual notice and that its justification was 'difficult at best.' Id.,* at 213." (Emphasis supplied.)

The Supreme Court in *Eisen* also reiterated its observation in *Mullane* v. *Central Hanover Bank and Trust Co.,* 339 U.S. 306 (1950), that notice by publication is a highly unreliable method of informing interested parties that their rights are before the court. The *Eisen* Court said (417 U.S. at 174 n. 12):

"* * * The Court's discussion of the inadequacies of published notice bears attention:

'It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. * * * The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention.' 339 U.S., at 315."

It is strained enough under these principles to allow notice by publication under Rule 23 only when it is "the best notice practicable" and only where it goes to members of a class who cannot be "identified through reasonable effort". However, the notice provision of Title IV would be applicable in any circumstances at all in a case brought under Section 4C.(2)(1). This undiscriminating provision violates the constitutional standards of *Mullane* as reiterated in *Eisen* (417 U.S. at 174):

"* * * [N]otice must be 'reasonably calculated, *under all the circumstances,* to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.' * * *" (Emphasis added.)

Failure to provide for constitutionally sufficient notice would destroy the binding effect, on all claimants who failed to opt out, of any future judgment in favor of

the defendant. This might require re-litigation with claimants who failed to receive the notice required by due process. *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940).

Senator HART. Our concluding witness today, and I apologize to him for making him wait so long in the afternoon, is Mr. David I. Shapiro, a partner in the Washington firm of Dickstein, Shapiro and Morin.

I confess to having flip-read your statement and that is the reason I wanted to be here to hear your summary in full. It is possible, but subject only to your schedule, I may have to take a recess which I hope will not be too long; an appointment has been made with the Treasury Department for a spokesman to meet with Senator Griffin and myself on a matter of parochial, but deep interest, in Michigan at a quarter of five.

Would you be able to wait for a little while longer?

Mr. SHAPIRO. Senator, I would be pleased to stay as long as necessary and I hope in the process—because my oral statement will be brief—if you wish to interrupt for a question at any point along the way, I would very much welcome such an interruption and I would very much appreciate if you would ask me any question at all because I am here to do the best I can to enlighten what I think has become a somewhat muddy subject when, in reality, it is not that muddy at all.

Senator HART. That is the way I want to come out.

STATEMENT OF DAVID I. SHAPIRO, PARTNER, DICKSTEIN, SHAPIRO & MORIN, WASHINGTON D.C.; ACCOMPANIED BY JAMES VAN R. SPRINGER, PARTNER

Mr. SHAPIRO. Senator Hart, as the other witnesses have said, I too appreciate this opportunity to comment on S. 1284, but I do so as a special advocate. My interest in the subject arises in my capacity as special counsel, sometimes as a special deputy assistant attorney general to a State, or a number of States in antitrust litigation, for example, the *Tetracycline* case in which my firm represented 20 States and a number of cities.

Now, on the whole, this bill provides a number of long-needed improvements in the antitrust laws. But in view of the time allotted to me, I'm going to refer the committee to my prepared statement,[1] which I believe anticipated most of the criticism leveled against the bill by my namesake, Mr. Shapiro, from New York, and by Professor Handler, both in his prepared statement and in his oral remarks.

In the time allotted to me, I want to comment only on two titles; title IV, the Parens Patriae provision, and title VI, relating to Nolo Contendere.

I think all the witnesses who testified here today, and I'm going to agree with them, came to the conclusion that title IV ought to be limited to suits on behalf of natural persons in their capacities as individual consumers and not in a capacity such as an individual proprietorship or a partnership.

[1] See p. 338.

I think that's what this bill is really aimed at, and as so aimed, it's sound in conception, and we think essential to assure both adequate protection of consumers and more truly effective antitrust enforcement.

While the States have met with substantial success in antitrust litigation, their ability, and that of private-class representatives, to obtain remedies for consumers has been restricted to suits involving relatively few commodities.

Consumers, under the law as it is today, can now be compensated for injuries caused by antitrust violations only if they have records, as with prescription drugs, of if their vendors have records, as with charge account customers.

Now, this makes price fixers and other violators effectively immune from consumer suits, when they fix the price of most of the commodities and services of every day life.

I think the most striking illustration of this occurred in the *Frito-Lay* case, which was talked about earlier today, and which is referred to in my prepared testimony.

This bill would eliminate this obstacle by permitting a State to recover aggregate damages on behalf of all its consumers and by permitting proof of damages by statistics or other reasonable methods of estimation.

Now, Professor Handler and Mr. Shapiro both have made the argument that the bill is unsound, because it would overturn what they claim is the settled rule, and they quote *Hanover Shoe* and a number of other cases for this proposition. According to them the rule is that only the first purchaser can recover and that the consumer has no standing to sue.

I might say, parenthetically, that both Professor Handler and Mr. Shapiro have been making the very same argument on behalf of their major corporate clients for years. But the fact of the matter is that there is no such rule. Let me tell you what the rule actually is.

If, under a price-fixing agreement, a plumbing manufacturer overcharges a builder $10 a bathtub, the man who purchased a house from the builder for $22,000 probably cannot sue to recover the overcharge on the bathtub. That's what they're talking about. In such a case, the courts sometimes hold, that since the first purchaser has altered the product, the overcharge, as a matter of law, is too difficult to trace, and those are the key words, "to trace," into the hands of the consumer.

Where, however, the consumer obtains the product from the first purchaser, or the middle man, in essentially the same condition as it was when the manufacturer sold it—and this is the case with pharmaceuticals, such as those manufactured by Bristol-Myers; that is the case with milk; that is the case with bread; that is the case with chicken; and that is the case with most of the commodities of everyday life—the courts hold that the consumer is entitled to prove his injury. Now, the case law on both sides of this issue is set forth in some detail by Judge Kirkland in a case called *State of Illinois* v. *Ampress Brick Co.*, and I've previously furnished your staff with a copy of that decision.

I think if you'll look at it, Senator, you will see precisely what I'm talking about. The problem, as I think my namesake finally did come to express, is a problem of tracing, and that is a question of proof.

The fact of the matter is, that the courts hold that insofar as most of the commodities of everyday life are concerned, the individual consumer has an opportunity to prove that he, in fact, and not some middleman, suffered the overcharge.

Now, what this bill would do, would be to enact into law, Judge Wyatt's groundbreaking achievement in *West Virginia* v. *Pfizer & Co.*

In that case 40,000 individual consumers in 43 States filed individual claims against a consumer fund, totaling approximately $30 million.

Something in excess of $8 million was actually distributed to the individual consumer claimants, with the excess going into State-sponsored health programs designed to benefit consumers as a class.

Now, this has come to be called "fluid class recovery," which is a kind of cy pres concept that permits funds recovered on behalf of a class to be used generally for the benefit of that class, even though the funds cannot be channeled directly to the particular class member who actually suffered the injury.

Now, what does this mean in practical terms? In the *Tetracycline* case, the average consumer claimant recovered $200. But some claimants recovered as much as $12,000, and the fluid recovery obtained on behalf of the 43 States funded a number of highly innovative projects.

The District of Columbia, for example, is using its excess consumer recovery to train 50 midwives over a 2-year period, freeing doctors to handle difficult maternity cases at D.C. General.

In Maryland, the funds were used to establish two new professorships for the study of tumors, one each at the medical schools of the University of Maryland and Johns Hopkins.

Wisconsin, beset by an epidemic of gonorrhea, spent 47 percent of its funds in an attempt to control that disease.

The majority of the States, however, spent all or part of their excess funds for programs to combat drug abuse. This, they felt, was the kind of program in which they felt they were going to be able to benefit consumers indirectly, and Judge Wyatt agreed in each of the cases.

For example, Alabama is using its money to complete a research project which is now close to synthesizing an anti-LSD drug.

Florida funded a scholarship program for needy students who agreed that after graduation they would agree to participate in drug abuse control programs as trained professionals.

Minnesota funded halfway houses for drug-dependent individuals and North Dakota and Vermont set up drug abuse educational programs in their public schools.

Now, these results demonstrate, we believe, that the parens patriae consumer action is no idle theoretical abstraction, but a very practical, real-life way of vindicating consumer interests damaged by antitrust violations.

And that's all I'm going to say about title IV. I hope the rest of my comments come in response to questions, and I'd like to turn to title VI.

The problem with giving nolo pleas prima facie effect is that it would discourage such pleas in many cases and we think that would be an undesirable result, from the standpoint of effective criminal enforcement.

We suggest that the purpose of the amendment incorporated in title VI is better served by leaving section 5(a) of the Clayton Act as

it is, but adding a provision making the fruits of the Government's investigation available to private litigants whenever a Government action is prematurely terminated by a nolo plea or by entry of a consent decree.

I think I agree with Professor Handler, that the prima facie effect of a Government judge is of relatively little help to treble damage claimants, because at most, it serves only as a guarantee that the plaintiff can get his case to a jury.

On the other hand, an enormous amount of time, an enormous amount of effort, is expended in private litigation for unearthing facts already developed by the Government.

While courts have allowed us access to documents obtained by the Government in a grand jury or other kind of investigation, this has generally required a great deal of time and effort in litigation before we get access to the documents.

But grand jury testimony, as distinguished from the documents, is even more difficult to get, and that's been made available to the plaintiff only when he meets the very considerable burden of demonstrating particularized need, and this is so, even after the Government case has ended.

Now, the result is, that a treble damage palintiff had to spend years and thousands of dollars deposing the very same people who have already testified before the grand jury.

In our view, traditional concerns about grand jury secrecy are irrelevant, once the criminal antitrust proceeding has terminated.

If there is concern that the rights of parties and witnesses, particularly third parties, somehow might be infringed, those parties, in our view, can always be protected by appropriate protective orders issued for good cause at the request of the parties seeking nondisclosure.

For those reasons I would suggest that the committee consider replacing the nolo contendere amendment, with a provision making Government investigatory materials available to treble damage litigants in the manner I've suggested.

I think it would be much more effective, and I think it would go much further in the way of deterrence in the enforcement of the antitrust laws.

Senator Hart, you're going to hear a lot of opposition to this bill, not only from Professor Handler or Mr. Shapiro, but from its natural opponents, which are in the main going to be representatives of most of the major corporations in this country.

You will hear, for example, as you heard today, that it is simply a device to exact excessive attorney's fees at the expense of the consumer, who will get next to nothing.

Now, in response to that kind of argument, I'd like to give you a graphic demonstration of consumers who get next to nothing.

I'd like to give you our check register for you to examine, of the consumers in the entities that I represented in the *Tetracycline* case, and if you would, I would appreciate it if you would take a look at them.

If you'll just skim through the register, you will see a list of something like 20,000 to 25,000 consumers who received amounts in varying sums up to $12,000, as a result of their participation as consumer claimants in the *Tetracycline* litigation.

I think it would be most instructive.

Senator Hart, I would also like to point, in this very same context, to those consumer claimants in the subsequent *California Antibiotics* case, who received a minimum of $150 per household out out of California's recovery in that case.

None of these consumers, Senator, none of those who appear in our check register, none of those who received a recovery in the State of California, I think it's safe to say, will testify in opposition to this bill.

Now, insofar as attorney's fees are concerned, I think I can speak for almost all members of the plaintiffs' antitrust bar, who would be tickled pink to receive as their fee for winning a case, what defendants attorneys such as Professor Handler and Mr. Shapiro, as a group, normally receive as their fee for losing. And if you want to write that into the bill, I think you will get the unanimous support of the entire plaintiffs' antitrust bar.

The fact of the matter is, that these fees are very closely supervised by the district courts, and I would hope that some recognition be given to the fact that in the *Tetracycline* case, although the fees might be large when you think about it as an abstraction, this is not the case when you consider that the fees, for example, paid to my firm, represented 10 years of effort on a purely contingent basis in which more than 50,000 hours of lawyer time were actually expended.

That's what it takes to bring one of these cases home and put money into the hands of the consumer.

Now, you will hear the claim, I think you heard it from my friend, Mr. Shapiro, he was quoting Judge Friendly, I believe, that this bill is nothing but legalized blackmail, and to hear Professor Handler talk, it will bring about nothing but financial ruin to the major corporations of this country.

My response is to invoke the same deities invoked by Professor Handler, and I invoke the deity of the first Mr. Justice Harlan, writing for the Supreme Court more than 70 years ago in the *Northern Securities* case, when he said, and I think this quote is particularly apt to the various criticism you've heard leveled against this bill:

> Many suggestions were made in argument based upon the thought that the anti-trust act would, in the end, prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that when it is attempted by legislation to restrain their operations and to protect the public against their operations, that predictions of ruin are habitually made.

Now, that ends my oral presentation. I would hope, Senator, that if you or any of your staff have any questions, I would be given the opportunity to answer.

Senator HART. I'm still looking for the Michigan recoveries in this book.

Mr. SHAPIRO. Unfortunately, Senator, I did not represent the State of Michigan in that case, and that represents the check register for the particular States that I represented, but I can provide you with a copy of a check register for the State of Michigan, and I think you will see the very same pattern obtained there as it did with the other 43 States that participated in the case.

There were some very handsome recoveries by individual consumers.

Senator HART. Mr. O'Leary?

Mr. O'LEARY. Mr. Chairman, I just have a couple of questions and then I'd like to turn it over to Mr. Nash.

Senator HART. I think, then, we'd better recess, because I have 4:45 p.m.

Mr. SHAPIRO. I'd be pleased to wait.

[Short recess taken.]

Senator HART. We will be in order.

Mr. Shapiro, I think Mr. O'Leary has a question.

Mr. O'LEARY. Mr. Shapiro, I want to focus on damages, more specifically, aggregating the fact of injury and the amount of damages.

Correct me if I state something which is wrong. Just for the record, I kind of want to explore this a little bit.

We are seeking, with respect to this legislation, to avoid a situation where each of 40,000 injured consumers comes before either a district court or a special master and separately and individually proves (a) that he's been injured, and (b) the amount of his injury.

Now, I don't know exactly what your proofs were in the antibiotic litigations. That was a settlement. I assume that you could get affidavits from each of the individual purchasers of drugs and then to further bolster that affidavit, perhaps records of wherever it is he purchased those drugs from the retail druggists.

That would be one way to do it. My question really is, if we have a piece of legislation which says that the State attorney general may sue as parens patriae on behalf of the individual consumers of the State that through the defendant's own records he can prove that the defendant sold x amount of his product during the period in question, that he can also prove if the overcharge was 10 cents per item or something like that, and that in effect, he persuades the court that you can multiply x times 10 cents and then treble it. But we don't know who those consumers are in his State who are the actual ones who are injured.

Is there anything unconstitutional or is there anything in the *Eisen* case which says that that sort of recovery is unconstitutional?

Mr. SHAPIRO. As a matter of fact, there's nothing in any case that I know of which holds that such a recovery is unconstitutional.

There was an offhand remark made in Judge Medina's opinion, that he felt that there was some—that fluid class recovery, which is the kind of thing that happened in the *Tetracycline* case, would create due process problems.

But the only judge he could bring along with him on that was Judge Lumbard, and both Judge Lumbard and Judge Medina were senior circuit judges. They could not persuade any of the active sitting judges of the second circuit that they were right on that particular issue, and as a matter of fact, the Supreme Court did, in fact, vacate Judge Medina's opinion.

So I don't think that there is any responsible opinion, legal opinion, to the effect that aggregating damages for the purposes of proving overall damage is unconsitutional.

As a matter of fact, this was precisely what the ninth circuit said was a very commendable thing to do in the *Frito-Lay* case.

The ninth circuit said that this may be the only solution to the problem that there is. Unfortunately, we cannot do it by improvising a judicial result.

In California, they said, "You go to Congress and get Congress to pass a bill giving you that remedy, and then come on back and sue again," and I think that's precisely what the ninth circuit did. There is a quote from the ninth circuit opinion in my prepared statement, which I think is explicitly that.

So I don't think there's any question about the authority to do this in a constitutional sense. There's no question about that at all.

Mr. O'Leary. In effect, in the antibiotic settlement, you had—and once again, correct me—did you not, the same situation that I'm posing to you.

In other words, we envision that a State attorney general will recover a fund but it may not be a settlement, but through the defendant's records, he gets a fund, and then he sets about trying to find out who those consumers are who were injured and pays them back.

We anticipate that he probably won't be able to find them all and pay them all back and that there will be a remainder which will have to be used for something.

My question is, when you were involved in the *Antibiotic* case, was the question of the constitutionality of this procedure raised during the course of the settlement?

Mr. Shapiro. As a matter of fact, the retail druggists who opposed the settlements did raise constitutional objections going to the methods that we were utilizing in trying to determine what the amounts of the overcharge were to consumers; and it was raised in the district court and Judge Wyatt brushed it off as being total nonsense, and I think it's total nonsense.

There's no constitutional objection—once a damage recovery has been obtained on behalf of a class as a group—to then turning around and seeking to discover who makes up that group, and then going ahead and distributing funds to that group, either as a result of direct claim solicitation against that particular fund, with or without investigation.

In the *Tetracycline* case, in those States and cities in which I represented the plaintiff, what we did was, we actually proceeded to field audit every claim of a consumer that came in with purchases of $1,000 or more, and we field audited something like, and I'm operating on memory now, something like 2,300-some-odd claims.

I know of that group we disallowed, and again, my figures are subject to check—it's all in a law review article which I've written on this particular subject, detailing the history of this experience—I think we disallowed something like 43 claims in their entirety as being without basis.

We lowered something like 600 and we raised something like 300, and I say the figures I'm giving you are from memory and they're ballpark.

But I do remember this one figure, and that was, that our margin of error on the basis of our statistical check, on the basis of these field audits that we were conducting, was approximately 7 percent from what had been actually claimed by the consumers. There was

a variance of 7 percent in terms of what the consumers had claimed and what our field audits actually showed.

So I think that's pretty accurate basis for determining just approximately what consumers do, in fact, spend for a particular product.

Now, if they put in a claim, under oath, that they estimate they spent so many dollars for a particular product, I think it's pretty much filing a tax return. You'll find that there are going to be errors. There are going to be some understatements. There are going to be some overstatements.

But within a given range, you're going to get a pretty accurate picture of what, in fact, the consumer did spend for a particular product over a given period of time.

But there's no due process problem in doing an administrative distribution, once the fund has been recovered from the defendants pursuant to title IV, as I understand it.

Mr. O'LEARY. Thank you, Mr. Chairman.

Senator HART. Mr. Nash?

Mr. NASH. Just before the short recess, Mr. Shapiro, you referred to the approximately 50,000 hours of work over 10 years, done by your firm in the *Tetracycline* litigation.

Can you provide for the record an approximation of what the contingent fee was in that case and what it works out to on an hourly basis?

Mr. SHAPIRO. I would be pleased to. My arrangements with the States and cities that I represented was on the basis of 15 percent of the recovery, subject to court approval.

The fact of the matter was, that I didn't get 15 percent, because the court didn't approve that much. The court approved a fee—I can give you the round numbers—it was between $6 and $7 million and it came out to approximately $128 per hour for this 10-year engagement.

On a comparative basis, we would have been a lot better off if we would have gotten the lowest normal hourly rate, then going during that 10-year period, and we would have done a lot better on the basis of the 50,000 hours if we got it on a pay-as-you-go basis, on the basis of $75 or $85 or $100 an hour.

I don't know if I'm coming through to you, Mr. Nash, but what I'm saying is this, that when a defendant's counsel defends one of these cases, he either does it on the basis of specific rates for specific partners, which may range as much—for some defendants counsel—as $300 an hour, scaled down to $200, to $150 for partners, then down to $75 and as low as $60 for associates.

I even know some firms that charge $20 an hour for paralegal time, and $10 an hour for stenographic time, in connection with defending one of these cases, none of which, so far as plaintiffs are concerned, are ever taken into account in determining what a plaintiff's fee ought to be, and I will tell you very frankly, I wasn't fooling when I said before, that the members of the plaintiffs' bar would be tickled pink to receive the same kind of hourly rate for winning—even on a contingent basis, which doesn't take into account the cases we lose, as the defendants' counsel do as a group for losing. I was not fooling, because on that basis, the fees we would have recovered in the *Tetracycline* case would have been substantially in excess of the fees that the court finally did award

to us. And that was after a long period of time, when we didn't get anything at all, and when the case was purely contingent.

And I want to say this about contingencies to give you an understanding of what actually goes on, because there was a lot of discussion about that today. And I do not think anybody really came to the heart of the problem. The heart of the problem is simply this. That except for one or two States, which have the budget for it, most of the States do not have the budget to go out and hire counsel on an hourly basis.

Plaintiffs' counsel, I think the large majority of them would much prefer to be hired on an hourly basis, the same way that defense counsel are hired. We think it would make for a lot more effective enforcement of the antitrust laws if we could sustain ourselves over the long period of time with regular income coming in.

Unfortunately, the States don't have the budget for that. They cannot get it from their State legislatures. So they go to experts in the field and say, "Look, we have a case, we want you to bring it. Whatever you recover for us, we will give you, subject to the court's approval"—in my case, they say 15 percent.

And sometimes it is 15 percent, and more often than not it is less than 15 percent. But if I lose—and I was the lead counsel in the air pollution case, and I spent 3 years in that litigation; and I invested over $300,000 of my firm's money in trying to clean up the polluted air over the Los Angeles basin, we did not get a dime; not a dime in that case.

Mr. NASH. Were your expenses reimbursed by the State?

Mr. SHAPIRO. We got our actual out-of-pocket disbursements which accounted for our transportation, but that is all we got.

But when I say about $300,000, I am talking about salaries. I am not talking about general overhead. I am talking about the salaries of the lawyers that participated in the litigation over that 3-year period. And we are talking about $300,000 that went right down the tube.

And there was just nobody there to pay us, because nobody had the budget to compensate us for that effort. Now, of course, nobody takes that into account; that is, the cases that one loses, when they talk about so called "excessive attorney fees." And unless that is taken into account, you cannot get a true picture of the kind of risk that a plaintiff's antitrust counsel actually engages in when he agrees to take on one of these massive pieces of litigation on a purely contingent basis. If we won every case, it would be different, but we do not by a long shot.

Mr. NASH. Is that the normal approach in the private plaintiff's arrangement with respect to expenses?

Mr. SHAPIRO. Actual out-of-pocket disbursements are always reimbursed.

Mr. NASH. What proportion of the $300,000, approximately, did that account for?

Mr. SHAPIRO. Oh, that was minuscule.

Mr. CHUMBRIS. Will you yield on that, Mr. Nash?

Mr. NASH. Certainly.

Mr. CHUMBRIS. I do not want to get into a discussion that others may have had on the question of the legal fees, other than reiterating

what Senator Hruska was trying to bring out with the attorneys general.

If Congress is going to enact a law in which we are going to give this responsibility to the attorneys general, and to the attorneys general's department of each of the States, then the way it should be operated is like the Antitrust Division is operating here in Washington, D.C.

We bring in a man who heads the Antitrust Division, and he may have been a man who is making $200,000 a year in private practice in the antitrust field. He gives up that practice, like Mr. Miles Kirkpatrick gave up a highly successful practice in Philadelphia, to come down to Washington to be Chairman of the FTC or Judge Richard McLaren, who headed the U.S. Antitrust Division.

Now, he is there, and he is battling with the biggest plaintiff lawyers, or lawyers representing corporations that come before him, but he is still getting whatever salary the Government pays. I know that similar examples are found in the Treasury Department.

There, a tax expert, who was earning in the six figures for years. He gave up his tax practice, came into the Treasury Department as an Under Secretary; he went back into his private practice. A new President came in and brought him back and made him Secretary of the Treasury. But while he was Secretary of the Treasury, he was making, I think, $40,000 a year as a Cabinet officer, now it is $60,000.

And the point that Senator Hruska was making, that if you are going to have this law, and if the attorneys general are going to take on this responsibility, then it should be incumbent upon the States to hire a man who is an expert in antitrust as a special assistant attorney general. However, whether you can find him or not, a person who will give up a highly successful practice, is another question.

But if he does accept and is going to assume that responsibility, then he should get the pay that would be equivalent to what the State attorney general's office would pay for such a special assistant.

Mr. SHAPIRO. Mr. Chumbris, can I comment on that just a moment?

Mr. CHUMBRIS. Certainly.

Mr. SHAPIRO. I think your observation is interesting, but I think, however, it overlooks a couple of facts.

First of all, I think you know that a major piece of antitrust litigation is not something that goes on for just a year or two.

Mr. CHUMBRIS. I understand.

Mr. SHAPIRO. Sometimes it lasts anywhere from 4 to 10 years.

Mr. CHUMBRIS. Even longer.

Mr. SHAPIRO. Sometimes even longer.

Mr. CHUMBRIS. The *Standard-Detroit* case started in 1940 and it did not end until 1959 in the Supreme Court.

Mr. SHAPIRO. Right. The fact of the matter is, that the State attorneys general are simply not going to be able to find anybody to give up private practice for 10 years, that is, anybody who is qualified as an antitrust litigator—to leave private practice for a period of 10 years and to go to work on behalf of the States at State salaries.

Now, what General Miller was saying, and I think was saying very effectively, is that he wants to be able to hire the same quality lawyers as the defendants are able to hire.

His problem is, that unlike Bristol-Myers, unlike Texaco, unlike United States Steel, he does not have the budget to go out and pay Professor Handler or Mr. Shapiro something like $200 an hour. He doesn't have the budget for that, so he is forced to go out and hire somebody, perhaps like me, or some other plaintiff's antitrust lawyer who is willing to take on one of these cases on a pure contingency, who will recover a fee only if—and I underline that "only if"—he wins.

Now, Professor Handler and Mr. Shapiro from New York get paid, win or lose. We at the plaintiffs antitrust bar get paid only if we win.

And I think that point has got to be hammered home. Nobody takes into account our losses. Nobody takes into account the fact that it takes at least 10 years to train a senior antitrust litigator, if he is going to be at least as effective as some of the gentlemen you have seen today here in this witness room, and I think quite clearly that you have got to give recognition to the fact that the States, unfortunately, do not have the budget to pay hourly rates. If they did, there wouldn't be any of this discussion about so-called excessive fees, which are, in fact, not excessive at all.

Mr. CHUMBRIS. And the discussion on this point is good for the record because then the reader of the record will realize that if the Congress gives this power to the States, the attorney general and his staff are going to be so busy with so many other things that they won't be able to handle the problem and it will necessitate private counsel to come in and do the job for the State.

And as long as those facts are in the record, then the Members of Congress can decide whether it is still a good thing to do or not.

Mr. SHAPIRO. Well, the thing I think you ought to also be aware of is, that while in years past, there was a great deal of hiring of outside counsel, many of the States are building up their own staff expertise. It has taken a long period of time, but a number of States are beginning to put more than just a toe in the water in terms of antitrust enforcement.

California is a prime example. It has been building up a staff of expertise over the past two decades. And I think it is probably able to take care of itself in representing the State and the State consumer in terms of antitrust enforcement. But California has a very big budget on a comparative basis, to be able to pay people to do this kind of work. And unfortunately, none of the other States do. That is, I think, an overstatement. I want to withdraw that, when I said "none of the others"—most of the others don't have that capability.

Mr. CHUMBRIS. I don't know if they still follow this procedure, but I believe it is a procedure in some States' attorney general's offices to hire a special assistant attorney general, who, by law, is still permitted to practice law, to do his regular practice, but at the same time he helps the State for a specific salary for this specific project, which is usually a fixed amount.

Mr. SHAPIRO. Well, Mr. Chumbris, that is not—first of all, a person who does that, and I know of no State specifically, where that is done, but assuming that is so, I would assume also that none of these people are hired on a full-time basis.

And if you are going to start one of these cases, let me tell you, those attorneys at the plaintiffs bar who are involved in them are

involved in them on a full-time basis, not 24 hours a day, as Senator Hruska stated, but let me tell you, at least a good 14 hours a day.

Mr. CHUMBRIS. This discussion on special assistant attorneys general is good for the record.

Mr. NASH. Let me move away from the question of fees, and turn to the more substantive provisions of title IV.

As you have heard this afternoon, and as other witnesses testified in the May hearing, it is contended that title IV is unfair as well as unconstitutional.

The grounds laid out essentially are: One, that the present law evidenced by the Supreme Court decision in *Hanover Shoe* v. *United Shoe*, precludes consumer recovery under section 4, that in any event, because of the difficulty of proving the passing-on problems, consumers are inappropriate plaintiffs under section 4; that the present law requires proof of individual injury and individual damage; and that permitting proof of aggregate damages and injury is unfair as well as unconstitutional.

Now, as I understand the predicate for those conclusions, it is based on a construction of the present class action concept of a representative suing on behalf of persons similarly situated. As I read title IV however, title IV is drafted in a way in which when the attorney general files suit, he is authorized to file suit on behalf of the State, not on behalf of the individual consumers in the State, and that the condition of filing such suit is that distribution be made in a certain way to consumers in the State.

Now on that basis, what is your evaluation of the constitutional infirmities of the approach taken by title IV and the relevance of the evaluations we heard earlier today by other witnesses?

Mr. SHAPIRO. Well, I just don't think there is anything to the constitutional argument whatever.

With regard to the question as to whether or not it is unfair, that is merely a subjective evaluation on behalf of the prior witnesses.

But with regard to the legal issues involved, it seems to me that what you are doing is creating a new cause of action on behalf of the State, which in turn is suing in a capacity on behalf of its individual consumers, and you are conditioning the State's right to bring that cause of action in that capacity on an obligation to distribute the funds that it recovers in that capacity in a certain manner.

And I just do not see anything wrong with that. It seems to me that what you have got is the same kind of problem. Whenever you create a new cause of action, this business about consumers having no standing to recover is, it seems to me, as I said in my opening statement, something which is just not the law.

And taking it on their premise, the premise that was argued by Professor Handler and Mr. Shapiro, I just do not find any merit in that notion.

The problem has always been—and this is what *Hanover Shoe* says—to trace the overcharge. If you cannot trace it, the courts are going to give it to the first purchaser, because they are not going to permit a defendant to escape simply by saying that the first purchaser passed it on.

If, however—and the courts have said this too—the consumer can trace the overcharge from the manufacturer to the first purchaser,

through the middleman to him, then he has got a right to come in to court and prove his claim.

And that, it seems to me, is precisely what this bill is going to allow you to do.

Mr. NASH. By title IV permitting proof of injury and damages to be established in the aggregate, does that change the burden of proof that a plaintiff would have to demonstrate the actuality of the damage and the amount of damage?

Mr. SHAPIRO. No. He still has the burden of proof. The plaintiff, that is the States in this context because it is a State cause of action—the State would have the burden of proving that the individuals within the State, as a group, were damaged in a certain amount.

And that would be the same burden of proof that any plaintiff, under any cause of action under section 4 of the Clayton Act, would have to meet.

It is the burden of proof spelled out in *Bigelow* and *Story Parchment* and in those cases which permit just and reasonable estimates based on sufficient data.

Mr. NASH. In your opinion, would the proof of the aggregate damage be any more or less speculative than proof of individual damages added up?

Mr. SHAPIRO. Probably, it would be less.

Mr. NASH. Why is that?

Mr. SHAPIRO. Because—and this is interesting—sometimes you are able, on the basis of the defendant's own statistical records, and own statistical surveys, which come in as admissions against interest, to have more reliable evidence as to what his sales were and his overcharges were in gross, than you would have if you would be trying to prove a particular sale and a particular overcharge on an individual basis.

Mr. NASH. My last question relates to your comments in your prepared statement, that adoption of rule 23's notice provisions would eliminate "any possible constitutional objection."

Does that statement imply that in your view the actual notice requirement of the *Eisen* case is of constitutional derivation?

Mr. SHAPIRO. Well, let's put it this way, *Eisen* did not go off on due process grounds. It was decided strictly on the basis of the literal wording of rule 23–C–2.

And, furthermore, in that case, there was a very peculiar situation. It is the kind of situation that would not ordinarily occur again in the next 50 consumer cases. I mean, if you are talking about consumer antitrust cases.

In that case, it turned out that the defendants had accumulated, in a computer bank, the names of 2,250,000 people who were affected.

And in that case, the court said that, "Since the individuals names, their addresses are already available, we think the best practicable notice is individual mailed notice."

Now, you take the ordinary consumer case, I think General Miller made the point very well. If you have an ordinary bread price-fixing case within the State of Virginia, who has a list of who the purchasers of bread are?—Nobody. You don't have that kind of list. And in that kind of situation, the courts have already held, and they squarely held it in the *Tetracycline* case, that due process was satisfied by the

use of quarter-page printed notices, and this was done by publication in every major newspaper in the United States in the States that were affected.

The notices were in English. Some were in Spanish. And some were in Japanese. But that notice, the Court of Appeals squarely held, satisfied due process requirements and, as a matter of fact, in Judge Medina's opinion in *Eisen*, he specifically pointed to what had occurred in the *Tetracycline* case, and he said, "That's right. In that case it was all right to go by publication."

So it seems to us quite clear that in the ordinary consumer case that a State would bring under title IV, notice by publication is clearly adequate to satisfy any constitutional question.

But because there could be a case, a specific case, in which you might have the names of the particular consumers available, the particular purchasers available; for example, a case involving a big ticket item such as automobiles, there you might run into a problem with regard to the question of notice.

And it seems to me that in that kind of case, it is better to be safe than be sorry 5 years down the line. And we would suggest, just to avoid any problem about it, that if the bill is enacted, that the committee provide quite clearly in the report, so that the legislative history is plain, that by adopting the language of existing rule 23–C–2, that what it was doing was saying that in most cases, notice by publication is adequate.

And that is what we mean when we are using the language of 23–C–2. And we are only putting in the literal language of 23–C–2 to cover that rare contingency where you are going to have the names of the actual purchasers of a particular product, commodity, or service.

Mr. NASH. Thank you very much, Mr. Shapiro. I have no further questions, Mr. Chairman.

Senator HART. Mr. Shapiro, I think you have sensed, because of the time we have held you here, that your testimony has been welcome.

And I conclude as I began, by thanking you for your patience. For the record, would you care to identify your associate?

Mr. SHAPIRO. This is my law partner, James vanR. Springer, and he is accompanying me here today.

I would say this, Senator, if there are any questions that you or any member of the staff, or any other subcommittee member has, and that they would like me to answer, I am available at any time.

I think that this is, perhaps, the most important piece of legislation in the antitrust field that I have seen come down the road in all my years at the bar.

And while I can't say that I have spent as many years at the bar as Professor Handler, they have been a good many.

Senator HART. Thank you, gentlemen, very much.

Mr. SHAPIRO. Thank you, sir.

[The prepared statement of David I. Shapiro follows. Testimony resumes on p. 347.]

PREPARED STATEMENT OF DAVID I. SHAPIRO, PARTNER, DICKSTEIN, SHAPIRO & MORIN, WASHINGTON, D.C.

Mr. Chairman and distinguished committee members, I appreciate the opportunity this morning to comment concerning S. 1284, a bill to permit the Attorneys General of the several states to secure redress to the citizens and political subdivisions of their states for damages and injuries sustained by reason of violations

of the antitrust laws. This bill is of special interest to us in our role as special counsel to a number of states in antitrust litigation under Sections 4 and 16 of the Clayton Act.

My firm's experience as counsel for governmental plaintiffs began in the *Antibiotics* litigation before Judge Inzer B. Wyatt in New York, which is generally credited with developing the antitrust consumer class action. See *State of West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd* 440 F. 2d 1079 (2 Cir.), *cert. denied*, 404 U.S. 871 (1971); *City of Philadelphia* v. *Chas. Pfizer & Co.*, 345 F. Supp. 454 (S.D.N.Y. 1972). We currently are special counsel in each of the following class actions where states are the principal plaintiff class representatives:

Ampicillin Antitrust Litigation (D.D.C. Misc. 45–70, consumer and governmental entity classes); *Automobile Fleet Discount Litigation* (N.D. Ill., E. Div. No. 71 C 830, governmental entity classes); *Cast Iron Pipe Antitrust Cases* (N.D. Ala., S. Div. C.A. 71–516, now in the process of administration of a settlement in favor of governmental entity classes); and *Chicken Antitrust Litigation* (N.D. Ga. Civ. No. C75–2454A, governmental entity classes asserted).

On the whole, S. 1284 appears to us to provide a number of long-needed improvements in the antitrust laws. I wish to comment specifically upon Title IV (the "parens patriae" provisions) and Title VI (relating to *nolo contendere*).

I endorse Title IV wholeheartedly, consistent with the position that we have taken with respect to the similar bill now pending in the House, HR 6786. With respect to Title VI we wish to suggest an alternative means to the same desirable end.

1. TITLE IV

We believe that Title IV is sound in its conception and is essential to assure adequate protection of consumer interests and, more generally, truly effective antitrust enforcement. While the States have met with substantial success in antitrust litigation, their ability (and that of private class representatives) to obtain remedies for consumers has been limited to suits involving relatively few commodities; a State can be a class representative for consumers only if it makes or directly finances purchases of the product in suit in the same manner as consumers, and under the principles applied thus far it appears that consumer damages depend upon the availability of some documentation of individuals' purchases. Consumers can now be recompensed for injuries caused by antitrust violations only if they have records (as with prescription drugs) or if their vendors have records (as with charge account customers). This makes price fixers and other violators effectively immune from suit when they overcharge purchasers of most of the commodities and services of everyday life. Moreover, antitrust defendants may effectively resist liability on the basis of complexities in the distribution of commodities by middlemen and other obstacles to the calculation of damages. And actual damage awards are limited to the amounts claimed by persons with the knowledge and sophistication needed for the presentation of individual claims.

The Bill would effectively eliminate these obstacles by permitting a State to recover aggregate damages on behalf of all its consumers and by permitting proof of damages by statistics or other reasonable methods of estimation. The State would be permitted to sue with respect to all commodities and services and, after individual distribution to the maximum extent feasible, to use any surplus recoveries for public purposes. States—which have been recognized by the courts as ideal consumer representatives [1]—would thereby be greatly assisted in their growing role as antitrust enforcers and protectors of the economic interests of the public.

Section 4C(a)—Parens Patriae Suits

We agree with Mr. Kauper's suggestion on behalf of the Administration, in his recent testimony on S. 1284, that the remedy provided in Sec. 4C(a)(1) should exclude corporations; inclusion of businessmen would further raise complications insofar as consumers and middlemen (whose claims would conflict) would both be represented by the State. In addition, valid objections might conceivably be raised to relieving corporations and other large claimants of individual proof of the amount of their damages, which is feasible on the basis of their own records or those of defendants. In contrast, individual consumers do not normally have

[1] *E.g.*, *State of Illinois* v. *Bristol Myers Co.*, *et al.* 470 F. 2d 1276, 1277–1278 (D.C. Cir. 1972): *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F. 2d 1079, 1089–1091 (2 Cir.), *cert denied*, 404 U.S. 871 (1971): *In re Antibiotics Antitrust Actions*, 333 F. Supp. 278, 280 (S.D.N.Y. 1971).

records showing their purchases, and they can be given a remedy for the wrong only through establishment of aggregate damages. In the case of individuals, such an approach is consistent with the principle expressed in *Story Parchment Co.* v. *Paterson Parchment Co.*, 282 U.S. 555, 563 (1931), that "Where the tort itself is of such nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts . . . [T]he risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party."

Accordingly, the remedy should be limited to "*natural* persons," and either the statute itself or the legislative history should make it clear that the remedy extends only to natural persons in their roles as consumers and not to business activities carried on by partnerships or sole proprietorships. We believe that existing law permits an adequate remedy for both large and small business enterprises.

For similar reasons we would delete the provisions for state suits on behalf of political subdivisions [Sec. 4C(a)(3) and Sec. 4C(c)(1)]. While political subdivisions would benefit from relaxed standards of proof of damages, existing law is plainly adequate to permit them to recover their own damages either in individual actions or in class actions. Furthermore, State Attorneys General already have ample authority to act as class representatives of political subdivisions under Rule 23 and this right exists as a matter of federal law, irrespective of state law considerations. *State of Illinois* v. *Bristol Myers Co.*, 470 F. 2d 1276, 1278 (D.C. Cir. 1972); *State of Iowa* v. *Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391, 401–402 (S.D. Iowa 1968); *State of Minnesota* v. *United States Steel Corp.*, 44 F.R.D. 559, 568 (D. Minn. 1968); *State of Illinois* v. *Harper & Row Publishers, Inc.*, 301 F. Supp. 484, 487 (N.D. Ill. 1969); *In re Antiboitics Antitrust Actions*, 333 F. Supp. 267, 269 (S.D.N.Y. 1971); *In re Ampicillin Antitrust Litigation*, 55 F.R.D. 269, 274 (D.D.C. 1972).

In sum, Sec. 4C(a)(1) would change the result in *State of California* v. *Frito-Lay, Inc.*, 474 F. 2d 774 (9 Cir.), *cert. denied*, 415 U.S. 908 (1973), in which the State sued on behalf of citizens who had been overcharged pennies-a-piece on the purchase of snack foods. The Court of Appeals denied the State the right to proceed as *parens patriae*, holding that such authority "must come not through judicial improvisation, but by legislation and rulemaking." 474 F.2d at 777. Sec. 4C(a)(1) is the "legislation and rulemaking" that the Court was speaking of; it would close the loophole through which price fixers of milk, bread, chickens, sugar, lettuce and other commonplace foodstuffs, no less than snack foods, always escape with their illegal profits. In a case where the price-fixed product is widely sold, has been overpriced only pennies per unit, and no records of the purchases of individual consumers are kept either by the seller or the buyers, the State is, for the most part, the only real-life litigant. Yet it is in just such a case that, according to the Ninth Circuit, the State cannot now sue. In the absence of the *parens patriae* provisions provided by Sec. 4C(a)(1) of this bill, price fixers who perpetrate a series of individually small injuries to a wide cross-section of the consuming public will always be able to retain the fruits of their "perfect crime."

We strongly support the provisions of Sec. 4C(a)(2) which would permit a state to sue *parens patriae* for damages to its "general economy." However, since we are forced to conclude, with the Ninth Circuit,[2] that the "general economy is an abstraction" which is almost impossible to quantify in damage terms, we would urge adoption of the limitation in HR 6786 permitting *parens patriae* suits for injury to a state's general economy only "as measured by any actual decrease in [its] revenues, or any actual increase in [its] expenditures, or both * * *."

One might ask whether such a limitation would not transform Sec. 4C(a)(2) into a mere declaration of a right the state already has—namely, a right to sue for injuries to its business or property under Section 4. As a result of some unfortunate dicta in the Supreme Court's opinion in *Hawaii*, limiting suits under Section 4 to injuries suffered by the state "in its capacity of a consumer of goods and services" (405 U.S. at 265), the answer is probably "no." Let me give you an example.

In the *Air Pollution* cases,[3] the state sued *parens patriae* to recover for expenditures it would not have made but for defendants' antitrust violations. These expenditures were incurred—

(1) For installation and maintenance of special air conditioning and ventilating equipment in vehicular tunnels, garages and buildings,

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[2] *Hawaii* v. *Standard Oil Co. of California*, 431 F. 2d 1282, 1285 (1970), *aff'd*, 405 U.S. 251 (1972).
[3] *In re Multidistrict Vehicle Air Pollution, MDL No. 31*, 481 F. 2d 122 (9 Cir. 1973).

(2) For installation and maintenance of certain kinds of incinerators in state supported housing projects,

(3) For repair of government property damaged by air pollution attirbutable to automobiles,

(4) For the provision of health care in government-owned medical facilities to persons injured by automotive air pollution, and

(5) For the expense of regulatory activities necessary to prevent and ameliorate automobile air pollution that would not have occurred but for defendants' conspiracy.

In addition, the State of California sued for injuries to its tax base caused when, as a result of increased automobile air pollution directly attributable to defendants' conspiracy, businesses refused to move into the Los Angeles area and others moved out of state. In response to all of these damage claims—each of them clearly measurable and none of them an abstraction—the Ninth Circuit said: "[S]ince the government's * * * parens patriae claims allege [no] injury to commercial ventures or enterprises, the governmental entities cannot seek recovery under section 4 of the Clayton Act." (481 F. 2d at 12).

With the modification already adopted by HR 6786, Sec. 4C(a)(2) would reverse the unfortunate result in *Air Pollution*, and would be most useful in other similar cases.

Before leaving Sec. 4C(a), we wish to note our agreement with the Administration (again speaking in Mr. Kauper's testimony on S. 1284) that the new consumer remedy should not be diluted by permitting courts to reject it in favor of class actions, as Sec. 4C(1)(a) would provide. Any concerns that might underly such a provision would be satisfied, we believe, by the strengthening of the notice provision that we suggest next.

Section 4C(b)—Notice

We recommend that the notice requirement for *parens patriae* consumer actions be made the same as that for class actions in existing Rule 23(c)(2) of the Federal Rules of Civil Procedure. This would clearly eliminate any possible constitutional objection while assuring that the notice requirements would not be unduly expensive or burdensome in the typical consumer case. For in virtually all such cases, the language of the Rule (and the Constitution) are satisfied by publication of notices in appropriate newspapers.

Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), did not detract from the principle that published notice is normally appropriate. *Eisen* involved the highly unusual situation where the names and addresses of some 2,250,000 class members happened to be available; the requirement of notice to each of those persons was based simply on the language of Rule 23, and the Court avoided saying that the Constitution required individual notice even in that unusual situation. Due process may well require less strict notice in a class action or *parens patriae* case—where the litigation can only bring individuals a benefit that would not otherwise be available to them as a practical matter—than in the cases requiring individual notice as a constitutional matter—where the litigation would have taken something away from individuals.[4]

There are few if any consumer cases that fall into the *Eisen* category, since it is extremely rare that the names and addresses of consumers of a product "can be identified through reasonable effort." Except for "big ticket" items such as automobiles, who has a list of the consumers of anything? It would be remembered that the Second Circuit opinion that the Supreme Court affirmed in *Eisen* expressly recognized that in the *Antibiotics* cases it was "clear that reasonable effort would not have uncovered the names and addresses of the members of the consumer class of persons who bought the drugs on prescription at drug stores. Therefore, publication as to the consumer class was deemed sufficient." 479 F.2d 1005, 1015 n. 17 (2 Cir. 1973). Another panel of that Court had specifically so held in *State of West Virginia* v. *Chas. Pfizer & Co.*[5] There will be extremely few, if any, cases under Sec. 4C(a)(1) where traditionally published notice would not clearly safisfy the Rule 23 language.

Sec. 4C(b) should therefore be strengthened to make the notice requirement for *parens patriae* consumer actions the same as that for class actions in existing

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[4] In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the issue in the litigation was whether the bank's account as trustee of a common trust fund should be approved, thereby barring beneficiaries' claims against the trustees; the Court based its due process holding on the fact that "the proceeding is one in which they may be deprived of property rights * * * ."(*id* at 313). Similarly, the issue in *Walker* v. *City of New York*, 352 U.S. 112 (1956), was condemnation of real estate in proceedings where the owners were wholly unrepresented because of failure to give individual notice.

[5] 440 F.2d 1079, 1090–1091 (2 Cir.), *cert denied*, 404 U.S. 871 (1971).

Rule 23(c)(2). The legislative history should make clear that this is being done in order to eliminate any conceivable constitutional objection in that rare case in which consumers "can be identified through reasonable effort." Such a provision would answer much of the criticism leveled against the bill. Based on our experience, we are confident that such notice is feasible in State-sponsored and other consumer actions. Because most *parens patriae* actions would involve multiple states, the present language incorporating state-law notice requirements would cause undue complexities and should be deleted.

Section 4C—Measurement and Distribution of Damages

Sec. 4C(c)(1) adapts the principle that "[i]t is far simpler to prove the amount of damage to the members of the class by establishing their total damages than by collecting and aggregating individual damage claims as a sum to be assessed against the defendants." *In re Antibiotics Antitrust Actions*, 333 F. Supp. 278, 281 (S.D.N.Y.), *mandamus denied*, 440 F. 2d 119 (2 Cir. 1971). The notion that class-wide damage recoveries are somehow unfair to defendants was scotched by the Ninth Circuit in *California* v. *Frito-Lay, Inc.*, 474 F. 2d 774 (9 Cir.), *cert. denied*, 412 U.S. 908 (1973). Although holding that it had no authority to award such relief, the Court encouraged California to obtain it from Congress. The Court said:

"The state most persuasively argues that it is essential that this sort of proceeding be made available if antitrust violations of the sort here alleged are to be rendered unprofitable and deterred. It would indeed appear that the state is on the track of a suitable answer (perhaps the most suitable yet proposed) to problems bearing on anti-trust deterrence and the class action as a means of consumer protection. We disclaim any intent to discourage the state in its search for a solution. However, if the state is to be empowered to act in the fashion here sought we feel that *authority must come not through judicial improvisation but by legislation and rule making* * * *." 474 F. 2d at 777. (Emphasis added.)

The legislation under consideration today would give the Ninth Circuit the authority it was looking for.

For purposes of clarity, we would revise Sec. 4C(c)(1) to provide that "damages may be proved and assessed in the aggregate by statistical or sampling methods or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit, without the necessity of separately proving the fact or amount of damage * * *." Statistical and sampling methods are commonplace in the federal courts,[6] and there is a special body of antitrust authority establishing not only that the amount of damage may be determined by "a just and reasonable estimate * * * based on relevant data," *Bigelow* v. *RKO Pictures*, 327 U.S. 251, 264 (1946), but that it is sufficient if "the result be only approximate." *Story Parchment Co.* v. *Paterson Parchment Co.*, 282 U.S. 552, 563 (1931).[7] It is unclear to us what subsection (B), permitting the pro rata allocation of illegal overcharges or excess profits, adds to the statute, and we would delete it. We would, however, add a phrase eliminating the "necessity of separately proving the *fact* or amount of damage * * *." This is needed because it is generally accepted that the *fact* of injury (*i.e.*, that the plaintiff has suffered *some* harm) is an element separate from the amount of damages. Unless the clause is explicit, it might be argued that each claimant would have to prove the fact of injury *separately* even if the amount of damages could be determined cumulatively.

Sec. 4C(c)(2) would enact into law Judge Inzer B. Watt's ground breaking achievement in *State of West Virginia* v. *Chas. Pfizer & Co.*[8] In that case, 40,000 consumers in 43 states filed individual claims against a consumer fund totalling approximately $30 million. Something in excess of $8 million was actually distributed to the individual consumer claimants with the excess going into state sponsored health programs designed to benefit consumers as a class. This has come to be called "fluid class recovery," a kind of *cy pres* concept that permits funds recovered on behalf of a class to be used generally for the benefit of that

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[6] *E.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 339–343 (1962); *United States* v. *United Shoe Mach Corp.*, 110 F. Supp., 295 305–307 (D. Mass. 1953); *Rosado* v. *Wyman*, 322 F. Supp. 1173 (E.D.N.Y. 1970.) *aff'd* 437 F. 2d 631 (2 Cir. 1971) (citing numerous cases and other authorities, 322 F. Supp. at 1180–1181); *Zippo Mfg. Co.* v. *Rogers Imports, Inc.*, 217 F. Supp. 670, 680–784 (S.D. N.Y. 1963).

[7] *See also Terrell* v. *Household Goods Carriers' Bureau*, 494 F. 2d 16 (5 Cir. 1974); *In re Western Liquid Asphalt Cases*, 487 F. 2d 191, 200–201 (9 Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F. 2d 874, 887 (1 Cir. 1966); *Atlas Bldg. Prod. Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950, 958 (10 Cir.), *cert. denied*, 363 U.S. 843 (1960); *Flintkote Co.* v. *Lysfjord*, 246 F. 2d 368, 392 (9 Cir.), *cert. denied*, 355 U.S. 835 (1957).

[8] 314 F. Supp. 710 (S.D. N.Y. 1970), *aff'd* 440 F. 2d 1079 (2 Cir.), *cert. denied*, 404 U.S. 871 (1971).

class even though the funds cannot be channelled directly to the particular class members who actually suffered injury.[9]

In practical terms the average consumer claimant in *West Virginia* recovered $200, some claimants recovering as much as $12,000. And the "fluid recovery" obtained on behalf of the 43 States funded a number of highly innovative projects.

The District of Columbia, for example, utilized its excess consumer recovery to train 50 midwives over a two year period, freeing doctors to handle difficult maternity cases at D.C. General Hospital. In Maryland, the funds were used to establish new professorships of clinical oncology, the study of tumors, one each at the medical schools of the University of Maryland and Johns Hopkins. Wisconsin, beset by a epidemic of gonorrhea, spent 47% of its funds in an attempt to control that disease. And Missouri, dissatisfied with the wholly inadequate rehabilitation methods available for aggressive delinquents at its State Training School for Boys, funded alternative pilot community treatment centers in converted residences in the inner cities of St. Louis, Kansas City and Springfield. The list does not end there.

Kentucky contracted with a non-profit corporation to use college students and student nurses to improve health, nutritional and medical care in the rural eastern part of the state where health facilities were virtually nonexistent. Oklahoma, which had a similar problem, provided physicians, nurses, dieticians and medical social workers for a clinic in Wakita. Mississippi, which had adequate kidney treatment facilities, used its funds to obtain the supplies necessary to sustain individual treatment, $3,000 per patient per year. Iowa divided its money 7 ways: 20 percent to improve public health nursing services; 15 percent each to fight drug abuse, screen for sickle cell anemia, immunize against measles, treat VD and provide emergency health services; and 5 percent to inspect waste-treatment plants. Louisiana split its money among 12 state institutions for disabled and crippled children.

The majority of the states spent all or a part of their excess funds on different programs to combat drug abuse. Alabama is using its funds to complete a research project which is now close to synthesizing an anti-LSD drug. Florida funded a scholarship program for needy students who agreed that after graduation they would participate in drug abuse control programs as trained professionals. Texas allocated money for community health centers, partly for around-the-clock crisis assistance in drug emergencies, including telephone counseling and pick-up service where needed. Minnesota funded halfway houses which play a vital role in the rehabilitation of drug dependent individuals. And North Dakota and Vermont set up drug abuse educational programs in their public schools.

The results in *West Virginia* demonstrate, we believe that "fluid recovery" is no idle, theoretical abstraction, but a practical, real-life way of benefiting consumers as a group once individual claimants have been paid their damages. In order to encourage judicial creativity in this area, we would revise Sec. 4(c)(2) to eliminate subsection (B), so that the section would then read, "(2) shall distribute * * * the funds so recovered either in accordance with State law, or as the district court may in its discretion authorize." By doing so, Congress would be leaving it to the district court's discretion in any particular case whether or not state law (normally involving simple escheat) should be applied in distributing funds unclaimed by individual consumers or whether a *cy pres* or "fluid recovery", such as that utilized in *West Virginia*, should be applied.

Sections 4D and E—Suits by the Attorney General of the United States

Secs. 4D and E contemplate the bringing of actions by the Attorney General of the United States on behalf of states which do not commence actions themselves. We oppose these provisions.

The mandatory provision appearing in HR 38 was opposed in the House testimony last year by both the National Association of Attorneys General and the Antitrust Division of the Department of Justice, and we agree that there should be no such mandatory provision. The provision in Sec. 4D of S. 1284 making such actions by the United States discretionary is an improvement, but we do not believe that the United States should be encouraged to sue on a cause of action that belongs entirely to a state. Since the state owns the claim even where its

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[9] This concept had previously been applied in *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 584 (1949); *Northern Natural Gas Co.* v. *FPC*, 225 F. 2d 886, 893 (8 Cir. 1955); *Bebchick* v. *Public Utilities Comm.*, 318 F. 2d 187, 203–204 (D.C. Cir. 1963, *en banc*); *Market St. Railway Co.* v. *R.R. Comm.*, 28 Cal. 2d 363, 171 P. 2d 875, 881 (1946). See generally, Pomerantz, *New Developments in Class Actions*, the Business Lawyer 1259, 1260–1263 (1970).

expenditures are partially funded by the federal government,[10] our position with respect to Section 4D is equally applicable to Section 4E.

The states have shown no lack of antitrust vigor in recent years, and it can reasonably be expected that they will continue to bring those cases that ought to be brought. On the other hand, there are cases that should not be brought in the light of a prudent allocation of resources, often because the potential damages do not warrant the massive efforts that such cases always require. The State Attorneys General are in a much better position to make such judgments for themselves than is the Antitrust Division. The Antitrust Division should devote its full resources to investigating violations and conducting criminal and injunctive proceedings, without the diversion of resources that would inevitably be required for investigating and litigating state claims. Finally, we believe that placing such a responsibility upon the federal government would risk diluting the incentive that the States now have for vigorous antitrust enforcement, with the potential result that fewer cases will be brought.

TITLE VI

The purpose of this amendment is the commendable one of reducing the adverse effect of *nolo contendere* pleas upon private actions. The problem we see with giving *nolo* pleas prima facie effect is that it would discourage such pleas in many cases—an undesirable effect from the point of view of effective criminal enforcement and the maximization of the Antitrust Division's limited resources. We suggest that the purpose of the amendment would be better served by leaving section 5(a) of the Clayton Act as it is but adding a provision making the fruits of the government's investigation available to private litigants whenever a government action is prematurely terminated by *nolo* pleas or by the entry of a consent decree.

Our experience as counsel for antitrust plaintiffs confirms the view that the prima facie effect of a government judgment is of relatively little help to treble-damage plaintiffs. The Supreme Court correctly observed in *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 319 (1965), that a government judgment "often is of limited practical value." This is so not only because of the difficulty of relating the violation established to proof of impact and damages but also because "once the defendant comes forward with countervailing evidence to rebut the prima facie effect of the decree, the case proceeds much the same as if it had never been introduced." *State of Michigan* v. *Morton Salt Co.*, 259 F. Supp. 35, 65 (D. Minn. 1966).

On the other hand, an enormous amount of time and effort is commonly expended in private litigation for the redevelopment of facts that have already been developed by the government. While the courts have allowed access to *documents* obtained by the government in a grand jury or other investigation, this has required considerable litigation in each case. Grand jury *testimony*, on the other hand, has been made available only in certain limited situations, even after a government case is entirely ended—with the result that a treble-damage plaintiff sometimes has to spend years and thousands of dollars deposing the same persons who have already given full testimony to the grand jury. In our view, traditional concerns with grand jury secrecy have no relevance to an antitrust investigation that has resulted in a terminated criminal proceeding. The rights of parties and witnesses can be fully protected by appropriate protective orders limiting the dissemination and use of government materials to particular cases.

Accordingly, we suggest that this Subcommittee consider replacing the *nolo contendere* amendment with a provision making government investigatory materials available to treble-damage litigants.

CONCLUSION

You are going to hear a lot of opposition to this bill, all of it coming from its natural opponents. You will hear, for example, that the bill is simply a device to exact excessive attorneys' fees at the expense of the consumer who will get next to nothing. In response, I would like to show you a list of consumers who presumably got "next to nothing" in the *West Virginia* case. I would also like to point to the consumer claimants in the subsequent *California Antibiotics* case who received a minimum of $150 per household out of California's recovery. None of

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[10] *See State of Missouri* v. *Stupp Bros. Bridge & Iron Co.*, 248 F. Supp. 169, 175-188 (W.D. Mo. 1965).

these consumers, I think it safe to say, will testify in opposition to this bill. Insofar as attorneys' fees are concerned, I think I can speak for almost all members of the plaintiffs' antitrust bar, who would be happy to receive as their fee for winning a case what defendants' attorneys as a group normally receive as their fee for losing.

You will hear the claim that this bill is "legalized blackmail" and will bring about nothing but financial ruin. My response is the same as the response made by the Supreme Court of the United States more than 70 years ago in *Northern Securities Co. v. United States*, 193 U.S. 197, 351 (1904). There, the Court said:

"Many suggestions were made in argument based upon the thought that the anti-trust act would, in the end, prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions."

I have taken the liberty of setting forth in an appendix my suggested revisions to Title IV.

Appendix

S. 1284

Title IV—PARENS PATRIAE

Sec. 401. The act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, (15 U.S.C. 12), is amended by inserting immediately after section 4B the following new sections:

"ACTIONS BY STATE ATTORNEYS GENERAL

"Sec. 4C(a). Any State Attorney General may bring a civil action in the name of the State in the district courts of the United States under section 4, or 16, or both, of this Act, and such State shall be entitled to secure all the relief as provided in such sections:

"(1) as parens patriae on behalf of natural persons residing in such State injured by any violation of the antitrust laws.

"(2) as parens patriae with respect to any injury to the general economy of such State or any political subdivision thereof, as measured by any actual decrease in revenues, or any actual increase in expenditures, or both, of such State or political subdivision sustained by reason of any violation of the antitrust laws, except that such damages shall not be duplicative of any damages recovered under paragraph (1).

"(b) In any action under subsection (a)(1), the State Attorney General shall, at such time and in such manner as the court may direct prior to trial, cause notice thereof to be given by publication or as otherwise will provide the best notice practicable under the circumstances, including individual notice to all allegedly injured persons who can be identified through reasonable effort.

"(c) Any person may elect to exclude his claim from adjudication in an action under subsection (a)(1) by filing notice of his intent to do so with the court within sixty days after the date on which notice is given under subsection (b). The final judgment in such action shall be res judicata as to any claim arising from the alleged violation of the antitrust laws of any potential claimant in such action who fails to give such notice of intent within such sixty-day period, unless he shows good cause for his failure to file such notice.

"MEASUREMENT AND DISTRIBUTION OF DAMAGES

"Sec. 4D(a). In any action under section 4C(a)(1), or any other action under section 4 of this Act which is maintained as a class action on behalf of natural persons, damages may be proved and assessed in the aggregate by statistical or sampling methods or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit, without the necessity of separately proving the fact or amount of damage to each such person.

"Sec. 4D(b). In any action in which damages are proved and assessed in accordance with the provisions of section 4D(a), the court shall distribute any damages recovered:

"(1) In accordance with State law, or

"(2) In such other manner as the district court may in its discretion authorize, subject in either case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the net damages.

"DEFINITIONS

"Sec. 4E. For purposes of this section and sections 4C and 4D:

"(1) The term 'State Attorney General' means the chief legal officer of a State, or any other person authorized by State law to bring actions under this Act.

"(2) The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

"(3) The term 'natural persons' means individual consumers and excludes business activities carried on by partnerships or sole proprietorships.".

Senator Hart. We will recess to resume in this room at 9:30 tomorrow morning.

[Whereupon, at 5:50 p.m., the subcommittee adjourned, to reconvene at 9:30 a.m., June 4, 1975, in room 2228, Dirksen Senate Office Building.]

S. 1284—THE ANTITRUST IMPROVEMENTS ACT OF 1975

WEDNESDAY, JUNE 4, 1975

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room 2228, Dirksen Senate Office Building, Hon. Senator Philip A. Hart (chairman) presiding.

Present: Senators Hart and Abourezk.

Also present: Howard O'Leary, chief counsel; Bernard Nash, assistant counsel; Charles Ledlem of Senator Abourezk's office; Monica Walters, appearing for Patricia Y. Bario, editorial director; Catherine M. McCarthy, chief clerk; Peter N. Chumbris, minority chief counsel; and Charles E. Kern, assistant minority counsel.

Senator HART. The committee will be in order.

Senator Hruska hopes very much to be able to join us shortly after the hour, but has approved our start.

Not for the first time, this subcommittee welcomes the distinguished mayor of San Francisco, Mayor Joseph Alioto, an outstanding antitrust lawyer in the country.

Mayor, you proceed as you would like. We'll print in full the statement, and we will benefit from whatever you would like to tell us.

STATEMENT OF MAYOR JOSEPH L. ALIOTO, SAN FRANCISCO, CALIF., ON BEHALF OF NATIONAL CONFERENCE OF MAYORS, LEAGUE OF CITIES

Mayor ALIOTO. Thank you very much, Senator Hart.

I thank you very much for the invitation to the Conference of Mayors to come here to express their views on your bill to improve and facilitate the effective enforcement of the antitrust laws.

It goes without saying that the cities have a very vital interest in the enforcement of the antitrust laws, and one of the things I'm going to suggest later, that not only attorney generals or attorneys general throughout the United States should be given certain powers with respect to bringing action, that I trust that you would also give those same powers where the attorneys general do not act, and perhaps corporation counsels and city attorneys who have shown a greater disposition of evidence by the electrical cases to get in there and battle it out with the price-fixing monopolists.

So I am pleased to appear on behalf of the Conference of Mayors, because it's a subject matter that is very, very important to us; not only the economies of the State but the economies in certain cities can be vitally affected by some of the things that you are talking about in this bill.

Let me say, preliminarily, that I'm sorry I wasn't here yesterday when my good friend Milton Handler was present to talk about the horrible things that would happen, how the skies would fall if we enacted this bill.

Milton and I have been friends over a long period of time. As a matter of fact, when novices under the antitrust laws, young lawyers, would come to me, I would tell them that they ought to start their serious research on the antitrust laws by reading Milton's great article in 32, Columbia Law Review.

This is one of the great pieces of antitrust literature written from the standpoint of the victims of monopoly. Later on, you know, Milton started representing the defendants and he used to get out an annual survey of the antitrust laws and he'd send them up to the judges in special form, and they were all defense oriented and the judges would be quoting that they were slicing away the rights of the plaintiffs under the antitrust laws as reported from Milton Handler's annual survey of the antitrust laws.

Then we were able to get Milton, as a plaintiff lawyer, when the electrical cases came around, and at least for a 5-year period of time, that annual review of his was pretty good again.

He got back to that 32 Columbia Law Review, written in 1932, it got to be pretty good again for a while, and then the electrical case was over.

You see, the electrical cases are the cases that established that maybe the plaintiffs weren't all fellows who were bringing strike suits. Maybe they were a bunch of folks who were fighting against monopolies that affected widespread classifications of classes of people, and that maybe they ought to be encouraged.

This actually happened in the electrical cases, and actually Milton, as a plantiff's lawyer at that time, representing some of the utilities in the East, I told him in a public statement—he was present—that he marked the real watershed of the turn of the private antitrust action to respectability.

During one of the depositions in the electrical case, where they had one witness, 100 lawyers, and about five Federal judges, Milton was representing the plaintiffs in that case, and he drove up to the deposition in the courthouse, Foley Square in New York, in a big black limousine, and all the defense lawyers came out of the subway tunnels, right there in Foley Square, to go into the courtroom, and I told Milton, "That was the day when the plaintiffs' lawyers finally arrived in the antitrust laws."

Now Milton is out of representing the plaintiffs, so he's right back to where he started from.

Senator Hart. You've been driving a big black limousine a long time, too.

Mayor Alioto. So in any event, I read Milton's pieces, and part of the things I want to say here are in response to some of the things he said.

He is a great authority on the antitrust laws, both as a scholar and as a practitioner, but those of us who have been trying the cases and watching what Federal judges have been doing over a long period of time, perhaps have a viewpoint to offer that is a little bit different.

I filed my prepared statement [1] and I'd like it to be included in the record, but then I'd like to talk for a while and then submit to any questions you have in mind.

I'm sorry Senator Hruska isn't here. I enjoy my annual little debate with Senator Hruska on the subject matters and I trust he'll be able to come on in before the thing is over.

Mr. CHUMBRIS. He enjoys those debates with you, also. It's a two-way street.

Mayor ALIOTO. Well, I'm delighted. He's a great man, Senator Hruska. We have a differing view on the antitrust laws, but I have great respect and admiration for the conviction he carries on his views and the persuasiveness with which he asserts that.

Now, let me talk about parens patriae, because that was our case, Senator. The *Hawaiian* case was our case.

When consulted by the attorney general of Hawaii, he says, "It looks to me like there might be substantial evidence of a widespread price-fixing case that every retailer is victimized by when he goes up to that filling station."

He looked at the price of oil there in Hawaii, at gasoline in Hawaii. He looked at the price on the west coast.

We knew something about the world economics of petroleum and we couldn't justify that incredible difference in price between the west coast, particularly the Los Angeles market and Hawaii, on anything we knew about the cost accounting in that industry.

It looked to us like just the opposite, that maybe they were able to do a little better, so far as Hawaii is concerned

Then we gathered other evidence of what looked to us like collaborated activities and so we advised the attorney general of Hawaii, that we thought he had a lawsuit and that the lawsuit affected every single person who got up to a pump in Honolulu and the other cities of that great State, and further, in our opinion, affected the economy of the island directly.

So the question is: What kind of a remedy. We went at it in three ways. Hawaii, and this is typical of every State—it's also typical of every city—Hawaii has a right as a buyer of goods in a proprietary capacity to bring an action in connection with those goods that the State bought under a situation where the goods were subject to a price-fixing conspiracy.

Hawaii had a right, under rule 23(a), to bring a class action, to be the leader of a class action, and then we suggested to them that there was an opinion in the Supreme Court—you know, we think we can read opinions as well as anybody else—called the *State of Georgia* v. *The Railroad Cos.*, in which the Supreme Court said, long before *Hawaii*, that the doctrine parens patriae was applicable to a State suing under the antitrust laws.

The *Georgia* case was a case for injunction and damages under the antitrust laws. *Georgia* was saying that because of discriminatory price fixing on rail rates by the railroads, the economy of Georgia was greatly in jeopardy and that the consumers in the State of Georgia were paying prices that were out of line with competitive prices, that they were paying collusive prices, rather than competitive prices, and

[1] See p. 363.

the Supreme Court said, "that's right, they have a right to do it under parens patriae."

Parens patriae, of course, is a doctrine that goes back to the common law, and significantly, the common law development of the parens patriae simply said that the State or the King has a right to represent those who are under some kind of legal disability, incompetence, and others.

This is the way it started. It was basically those who, for whatever reason, didn't have the real right, the realistic right, to assert whatever claims they may have had for injuries to them, and so the State came in as the father of the country, parens patriae, the father of the citizens of the country, and Kings, or the State at common law, asserted that right for them.

Now, in America, long before the *Georgia* case, long before the *Hawaii* case, we decided in America that parens patriae, that is, the ability of the State to sue on behalf of its own citizens, in the role of a father, almost, did not depend on legal disabilities relating to incompetence or mental disorder, didn't depend on that, or being a minor, it didn't depend on that at all, that the State could do so in other situations.

So that here in America, long before the *Georgia* case, we had expanded the doctrine of parens patriae far beyond what it had been known in England.

So we looked at that decision. We think we can read decisions, and it says very clearly that the State of Georgia in that case had a right to bring a suit parens patriae on behalf of all of its citizens and on behalf of its economy.

Now, the *Georgia* case also included a prayer for damages, for money damages.

But the Court held with respect to that, though, that since those rates were fixed by the Interstate Commerce Commission that they were insulated from antitrust attack.

It didn't say in the *Georgia* case that, you could sue for injunction but you can't sue for money damages. It didn't say that at all.

But we get down to *Hawaii*. The district court rules in our favor. It says that's right, and says the *Georgia* case controls this.

We get up to the Court of Appeals of the Ninth Circuit, the most restricted antitrust court in this country—I'll talk about that in just a moment—and they say, "No, there's a difference between an injunction and money damages under the antitrust laws."

I don't think Congress intended any difference in those two sections. I think it's rather clear from the congressional debates of the time that Congress did not intend any difference, and those quotations from the congressional debates and the congressional documents by Justice Brennan in the Supreme Court and *Hawaii* case, I think show that very, very clearly.

But nevertheless, the ninth circuit said that. Had we gotten to the Supreme Court—one of the few cases, incidentally, of these days where you can get in the Supreme Court, where a private antitrust plaintiff can get into the Supreme Court, whether that private plaintiff is a State or whether it's an individual or a company, one of the few cases where you can, and a divided court said that *Georgia* applied only to injunction actions under the antitrust la s and had nothing

to do with money damages under the antitrust laws and we don't think that parens patriae was intended by the Congress to be included in connection with a damage action.

And so that's what happened in that case. Let me tell you the sequel to that. What the court said, to go back and "we've given you the right to sue as a class. You go on back and sue as a class."

Judge Pence in the islands had already ruled that it was impractical and unmanageable to bring the action as a class action. I think he was right.

I mean, everybody who ever bought a gallon of gasoline in the islands, in effect, was a member of that class, and how you were ever going to manage a law suit like that, as far as Judge Pence was concerned, when that question was raised he simply said, "it's unmanageable and we won't do it."

The Supreme Court then said, when they knocked out parens patriae and our reliance upon its earlier decision, "All right. We'll let you go back and bring it as a class action."

Let me tell you the final result of that case. The attorney general over in Hawaii was so discouraged he settled it for $200,000—a charge of massive price fixing covering every single resident of that island. That was the result of that case.

And so I say that there is today, a crack through which a lot of violations can fall, if you don't amend this bill to provide what Senator Hart is talking about in this amendment.

Now, let me say just a word as to why it's important that this reform be made legislatively.

There is no doubt about the basis that almost all of the restrictions that have been placed on the plaintiffs under the antitrust laws have been placed there by courts, most of whom, in terms of their economic prejudices, didn't like private enforcement of the antitrust laws, and many of whom didn't like governmental enforcements of the antitrust laws, either, whether the governments be the Federal Government or the State governments suing as private plaintiffs.

Let me prove that point. Eight times in a row we had to go to the Supreme Court to reverse the courts of appeals in the eighth circuit and the ninth circuit.

Eight times in a row, and we won every time. In those days you could get into the Supreme Court with an antitrust suit.

It's almost impossible to get into the Supreme Court with a private antitrust case these days because of the workload, and the courts continued to ingraft restrictions upon the antitrust laws that the Congress never intended.

In that first case, the Supreme Court represented a football player who said he was victimized by a boycott.

The courts got into some fancy semantical stuff, out there in the ninth circuit, about the public interest wasn't involved because it was just one ballplayer, and furthermore, since baseball was exempt under the antitrust laws, that football was more like baseball, and therefore, that could be exempt, too.

The Supreme Court straightened them out and said, "You don't have to prove a public interest other than the injury to specific competitors, whether they're big or little."

We thought that settled it beyond all time. Then we brought a case for a discount outfit who was boycotted by the suppliers.

Here again, we get some silly conversations from the courts about this—just one discounter is knocked out of business, you look in the yellow section of the telephone book; there are lots of other people who are selling at retail; therefore, the public interest is not affected.

We went to the Supreme Court and they told them again, "Quit fooling around." Justice Black literally told them, "Quit fooling around with the antitrust plaintiffs," that the elimination of one competitor from a market can affect the price structure. It can affect it dramatically.

So they settled that. Then we had to go up there, they denied us the right to try a case by jury. They said if an injunction suit was filed and damage suit was filed and we've tried the injunction suits first, that that was collateral estoppel or that settled the issue, and you weren't entitled to a jury on liability in the damage action.

All the way to the Supreme Court again, *Beacon* v. *The Theater Co.*, and they were told you can't take away a jury trial from these folks.

Then we brought some cases under the consignment contracts in the petroleum industry that the Senator is well aware of, and that's the consignment contracts, which were simply a resale price-fixing scheme and had been actually approved by the Department of Justice in a 1950 decree out there, and we said we didn't care whether the Justice Department approved them or not in a consent decree, or even a court decree.

All the way to the Supreme Court, *Simpson* v. *The Union Oil Co.*, and the court said, and I think it was almost a unanimous court, "that's an obvious resale price-fixing device, and we're going to outlaw it."

And in eight cases of that nature we had to go up on what appeared to be relatively simply propositions, clear restrictions on what Congress intended.

All the time the courts were saying, you know, the treble damage action is the greatest thing that was invented by the Congress.

It gives private enforcement. It's one of the greatest pillars of antitrust enforcement. They give you all the language and then knock you out on the decision, you know, with some silly thing like the public interest or something of that nature.

Then we brought the first class action before the class action rule, the first case. This is that case, *Continental* v. *Union Carbide*.

We had to go all the way to the Supreme Court to get that one straightened out, too. But the companion case involved a class action.

It's *Nesley* v. *Union Carbide*, 300 Fed (2), the citation in that case. We represented a group of miners who were mining uranium and vanadium ore.

They were paid zero for the uranium content of that ore because Union Carbide and the Vanadium Corp. of America said it was a Government secret as to the fact that the uranium had a utility.

But we couldn't pay them anything for it. We thought that an agreement to pay zero was an agreement to fix the price of the vanadium content of the ore by two companies controlling 95 percent of the business and it looked to us like a violation of the antitrust laws.

So we brought that case on behalf of, not just the 30 miners, who were the plaintiffs before the class action, but on behalf of the 300 miners, little partnerships, fellows who were up in the Colorado Plateau mining uranium and vanadium, and the court says, "That's right. You can do it."

This then led to the class action section, which is now section 23. Now, what's happened to the class action?

The courts are throwing the class actions out, on the ground that there are so many people involved where you have a price fix that affects consumers directly, that the class is unmanageable.

They're throwing them out one after another. Then the Supreme Court in the *Eisen* case, said that you have to give printed notice to every individual member of that class and that the plaintiffs who file have to undertake the cost of giving that notice.

So the more widespread the violation or the more widespread the number of victims of a violation involved, the more difficult it is to enforce the antitrust laws, and if you can't do it under parens patriae, if you can't do it under that doctrine that we're trying in the *Hawaii* case, then you don't do it at all.

And the malefactor, the great power in this case, the malefactors of great power, on broad price-fixing cases, simply keep the windfalls that they're able to get by collusive activity.

Now, we have to face up to certain fundamental facts, and the fundamental fact is that collusion is a way of life in American business.

Now matter how many electrical cases you bring, on matter how many gypsum cases you bring, no matter how many drug cases you bring, no matter how many plumbing cases you bring involving national price-fixing schemes by a few corporations, carried on collusively in hotel rooms, for the most part, with the falsification of records and with a large—with color codes and things like that that are being carried on by American businessmen, and it took this country a long time to realize that company officials did things like that, no matter how many of those cases, given the opportunity, they'll do it again.

The temptation to rig prices or to rig competitive biddings is as overwhelming as the temptation to commit other crimes when those crimes pay off.

We know that we're never going to get rid of burglary or robbery. There's always going to be a measure of it, no matter what kind of laws we pass, and you better understand that collusion is in the same category.

No matter how many laws you pass, no matter how tough you make it, the temptations to garner these tremendous profits without having to submit to competition are so great that few corporate executives can withstand it, given the right circumstances.

Many a time that old dictum of Adam Smith is absolutely correct. Given enough opportunities to meet and to socialize, corporate executives will ultimately get around to price stabilization schemes of one type or another. I think that's just a fact of life, a fact that we have to recognize. Now, when that's on a national scale, what happens?

I'm going to give you another example. My son just finished trying the case on behalf of a group of beef producers.

For 40 years this Congress has been asserting, and nobody has ever proved, that there was an actual conspiracy to control the producer

prices of beef to keep them down low and to raise the retail price of beef.

We've all been talking about this great spread, this inequitable spread that exists between what a cattleman gets and what the chainstores are selling on the retail side.

For the first time in a court of law before a jury we proved that case and the jury awarded damages at $11 million, which were trebled to $33 million in the case tried by my son and completed just last year.

After the conviction, after the jury found specifically in interrogatories that there was collusion on fixing the price of beef and also on retail prices, my son moved for a class action.

The judge said, "We've got a million cattlemen in this country. I regard that as unmanageable," and denied the class action.

And maybe he's correct. Now, when the Supreme Court said that we don't need parens patriae, and that's, in effect, what they said in *Hawaii*, because you have the class action, it simply flies in the face of all of this practical experience that we have garnered in this very area.

So the result, again, is that the class action becomes unmanageable. There are too many people involved, so the more multitudinous the victims in an antitrust conspiracy, the easier it is for the violators to escape having to discourage the fruits of their illegal conspiracy. There are just no two ways about that.

Now, I say the class action has been abused by some lawyers, and—and there's no question about it—very frankly, when class actions first came out, we brought that one up involving miners, because we had a designated class, we were asked to represent all of them, and we did it on that basis, and we basically established that law.

That was the case of first impression on class action. But there are some lawyers who've abused it. In the beginning, we wouldn't file class actions, and we ran into a very interesting experience.

We filed an action on behalf of a competitor or on behalf of a governmental agency charging widespread collusive price fixing, and the next day some lawyer who never heard of the antitrust laws would file a copy of a complaint and name everybody in the universe who's a member of the class. There have been abuses, there isn't any doubt about that, in the class action.

But it's an effective device where you don't have 10 million consumers affected or 1 million businessmen affected. It's an effective device.

But there are too many cases when you cannot use the class action, where if you can't use parens patriae, the doctrine that you're talking about putting in now where the State attorney generals can sue is simply going to lose the fight.

Now, my friend, Milton Handler, gave you the hobgoblin treatment and tried to scare you about the fact that there would be a denial of due process and a denial of all of the constitutional rights that you've permitted proof of damages on a statistical basis.

Somehow, that just is not true as it works out in the actual courtroom situations, in practical courtroom situations.

The statistical proof is used all the time, and it's establishable all the time. Let's assume a price-fixing conspiracy on gasoline, say the Hawaiian Islands.

Just as an example, there is not any doubt that those prices are fixed uniformly, for the most part, and that retailers will be paying on given days, or given weeks, or in given months, a uniform price throughout the island.

There might be some variations, but those variations can be adjusted without a great deal of difficulty. They can be adjusted.

And so your proof is by statistics in the industry, or what prices are charged in transactions between themselves. More often than not, proof is statistical. And you can establish that, say, at 58 cents—I think that was the price at that time, when it was almost 15 cents cheaper on the west coast—that a price of gasoline in the 1950's, but for the collusion, would have been at the same level, say, on the west coast, 10 or 15 cents lower.

You can establish statistical proof of damage. We do it all the time. And any notion that Dr. Handler tried to sell you yesterday, that this is going to constitute a violation of due process or some big innovation, that simply is not true. Some courts are a little tough on that proof of damages, but, for the most part, you are able to prove cases statistically.

In any event, just let me conclude by saying, in this area, that if you do not have the right to sue parens patriae, there are too many cases where the broader the scope of your conspiracy, the less likelihood there is that you will be forced to disgorge what are the emoluments of illegal action, and that is very clear.

We, simply, need this parens patriae to fill a loophole that permits antitrust violators to get away with huge amounts of money.

Secondly, on the parens patriae situation, I wish, Senator, you would consider putting in your bill, the right of the city attorneys or the corporation counsels to sue as well, on behalf of their city if the attorney general takes action.

You have it set up now, and with some controversy as I understand it, that if the attorney general does not take action in a situation where the Government has filed an action—where the Department of Justice has filed an action—why then the Attorney General of the United States can come in and do it.

I wish that before you reach that expedient, that you permitted the city's attorneys and the corporation's counsels to bring an action on behalf of their governmental units.

The effect of that will be this: It will almost force the others to do it; it will almost force the attorney general to do it on behalf of the State. And when he does it on behalf of the State, the court can work out an arrangement where he has precedence; where the attorney general of the State has precedence over the others.

But I think that it would be a mistake to leave the corporation counsels or the city attorneys out of the right to bring a suit on behalf of the municipalities that they represent on a parens patriae basis, when there are widespread violations affecting a large number of people who, otherwise, would have difficulty in suing as a class.

Now, while we are on that subject matter, if you are removing the idea of individual notice, which is onerous and unnecessary from parens patriae, you really ought to remove it from the class action as well.

Senator HART. I'm sorry, I was distracted. Please begin that point again.

Mayor ALIOTO. Very well. In the *Eisen* case in the Supreme Court, somebody sued on behalf of the consuming public or the dealing public that bought securities, and charged that there was a price fix on commissions. There was not much question about the fact that there was a price fix on commissions. The only question was whether it was exempted. And I do not know where the exemption was, as a matter of fact. But somebody sued on it.

So they got in the Supreme Court after about seven opinions in various courts—it takes them that long, you know, when you are representing the private people. They got in the Supreme Court and the Supreme Court said that, under rule 23–A, related to class actions, that you had to give notice to every individual who was affected by that deal, and that the claimant had to pay for it.

It is a practical matter. If it costs a nickel or a dime to send out a piece of mail—and it costs closer to a dime these days—if there are 10 million people, it would mean that the plaintiff would have to put up $1 million just to send out notices.

Now, the blunt fact of the matter is, that we permit notice by publication, you know, in many other situations. We permit notice by publication in trade journals. For example, in the cattle industry, that we know something about, that beef industry where we handle that litigation, those million beef farmers all knew about that action out in San Francisco. They followed it. It was widely publicized. There is an association that puts out a periodical. Notice in that periodical was given; sufficient notice to anybody.

But the requirement of individual notice simply means that, for all practical purposes, again, nobody is going to be there to assert a class action.

If you do not have parens patriae, you are going to have that great big loophole again.

Now, I think you ought to consider changing that notice that you have for parens patriae to make that applicable to class actions as well. And, simply, tell the court that you have to be satisfied if the notice by publication is sufficiently widespread so that those who are injured are informed about it and can, in fact, come in.

Now, let me talk about nolo contendere. My good friend Dr. Handler told you that he was a clerk for Chief Justice Stone. They wrote a famous decision called *Hudson* v. *The United States,* in which they held that on a plea of nolo contendere you can send somebody to jail, you can even send a man to the gallows, presumably, or to the gas chamber, on a plea of nolo contendere, for all practical purposes.

For the purposes of that case it was indistinguishable from a plea of guilty.

But then Dr. Handler goes on to tell you that the sky is going to fall if you make that plea of nolo contendere applicable as prima facie evidence in a private antitrust action.

And he says there are lots of people who plead nolo contendere who do not think they are guilty, but this is a way of disposing of the case.

I do not think that anybody could ever demonstrate that people who are not guilty plea nolo contendere willy nilly. That simply is not true.

In most cases, on price-fixing cases, where there are no defenses, where price fixing is illegal, per se, people plead nolo contendere because the Government has the goods on them; that is why they plead nolo contendere. And they, sometimes, plead nolo contendere as a way of permitting them to keep the gains they have made on their price-fixing conspiracy to prevent private parties from coming in and proving the case.

If there is no difference between a plea of nolo contendere and a plea of guilty for purposes of punishment in the particular case, why should there be a difference as it relates to private actions?

Now, here again, the Congress never said that a final judgment, except a plea of nolo contendere, shall be used in the private actions; some court grafted that restriction. And when some courts did, in early cases, the others simply followed without any questioning about that fact.

So, over the years, those who engage even in conspiracies as widespread as the electrical conspiracies, and as collusive in involving all of the secrecy involved in the coding, and the use of code names to avoid detection, and all the surreptitious type of price-fixing conspiracies that we have had, even some of those were permitted to plead nolo contendere. And so the plaintiffs had to prove the cases right from the beginning. They had to prove them de novo, almost, when they went to try those cases.

Some of us take the view that we are going to prove the cases de novo anyway because we got a little concerned about some of the restrictions the courts were putting on that section 5–A that related to the right to use a prior judgment as prima facie evidence.

So I would hope that you would, simply, take away what has been a court engrafted restriction upon the antitrust laws.

The Supreme Court said, for a long period of time, "quit putting restrictions on the plaintiff that the Congress did not intend." That continues the pace. It continues to happen. It is happening today.

The other day, some judge refused a class action, and stated very frankly, "I am refusing this class action because I think the class action in antitrust cases is just for lawyers, not for consumers, just for lawyers, not for consumers."

He threw out a class action in which there was a charge that there was a price fix on ceiling material—on ceiling tile—that affected a large number of governmental agencies. So he would not let that be processed as a class action. The statute of limitations is already passed.

So everybody, except the name plaintiff, who had been damaged, and damaged in big amounts, was denied the right to recover those damages.

Now, let me talk to you about some of those amounts in these national price-fixing cases.

You remember that when the electrical indictments were brought, back in 1960, that, in an inflationary period, there was a 50 percent drop in prices.

Now, in certain private actions we have brought, in the *Gypsum Wallboard* case, those were brought by my office long before the Government got into the act. Long before. And we had the usual conversation about bringing strike suits against great big national

corporations. We not only proved that national price-fixing conspiracy, but the Government, finally, came on in.

And there was a price-fixing conspiracy that took place, surreptitiously, in hotel rooms It was the classic electrical-type price fix on a national basis. And they finally paid $75 million in judgments out on the coast in San Francisco.

But more important, just as important as that $75 million in judgments paid by the gypsum industry, that price went down almost 40 percent. The price of wallboard, during an inflationary period, went down by almost 40 percent.

In that beef case that I talked about a while ago, when my son got injunctions against Safeway and Kroger before proceeding to trial against A. & P., the price to the beef producer went up 20 cents a pound. It had been at 26 cents a pound; almost doubled to the producer. It went up. This was a measure of damages used. Between 1970 and 1973, their price went up to that level, we think, as a result, and we argued to the jury, and the jury accepted the fact under the instructions of the court, and the court affirmed that judgment as being supported by sufficient evidence. It is on appeal now. The trial court affirmed that judgment as being supported by more than sufficient evidence, but that price went up to the producer by 20 cents.

We brought a case in herbicides—the Government was not involved in this—on behalf of a group of growers out in California—a group of farmers. That price was reduced 50 percent on the filing of the case. All of the nitrogen fertilizers were reduced by 50 percent when the farmers cooperative went into the business out there.

The notion that you cannot get very substantial reductions in prices during an inflationary period by a vigorous enforcement of the antitrust laws, is belied by many cases which have national implications.

This is why, what you are doing, Senator Hart, in connection with this proposed parens patriae, is very important.

One last word. Maybe before you finish, someday, I would just like to bring about five antitrust lawyers on the plaintiff's side, and three or four of the alumni of my office, to tell you the experiences that they are having now, that you cannot get into the Supreme Court with an antitrust case. Incredible experiences.

At the 10th Circuit, they took away a $3 million verdict in a gasoline case in Salt Lake City on the grounds that—in that case—the crude oil came to rest in Utah, was refined there, and, therefore, there was not any interstate commerce. You would not believe that kind of stuff in 1973. But they said it, and they did it, and you could not get into the Supreme Court on it.

Now, the judges are using this 13th juror approach. The plaintiff gets a verdict in a significant case, and as a 13th juror, he exercises discretion to grant a new trial. Nobody ever told him he was a 13th juror, but this is the kind of language that they are using.

We thought you had the right to a trial by jury in this country, and that some judge who, maybe, did not like the antitrust laws, whose prior experiences may have been wholly, for example, as a fair trade lawyer for a corporation as his whole trial experience, if he does not like the antitrust, he says, "I am the 13th juror, so I am going to take away this verdict, and I am going to grant a new trial."

That is actually worse, as a practical matter, than granting a judgment now which he can appeal immediately and, maybe, get reversed.

But this is what they are doing now to the plaintiffs. And unless we get some real reform in this area, you are going to lose the most effective pillar of antitrust enforcement you have which is, namely, the private action.

In any event, sometime before it is over, Senator Hart, I would like to bring five men, plaintiff antitrust lawyers who are of long-standing, who have great reputations at the bar with their fellow lawyers, and who do most of this work, and who, actually, try the case.

My office has tried more cases for plaintiffs than any office in the history of the United States. We have a greater number of cases, and a greater diversity of cases right now.

One of the problems about the class action is, that they become so lucrative to some lawyers they kind of leap into the thing; so lucrative that they will not take any other kind of actions. They will not take the individual competitor actions which are so important and which do effect things nationally.

But I would like to bring these lawyers to you and tell you what the courts are doing to us out there, now that it is clear you cannot get into the Supreme Court with an antitrust case.

And if you cannot get into the Supreme Court, the reform, the antitrust reform so desperately needed, has to be done right here in the Congress. It has to be done legislatively.

So I thank you for the opportunity of presenting and making this presentation on behalf of the Conference of Mayors.

And, as you know, the president of the Conference of Mayors this year was selected for that reason.

You ought to know, Senator Hart, we have had a long experience in the last 30 years in representing plaintiffs under the antitrust laws, and we have, approximately, 75 cases in the books. No other office has that many cases which make this law—and the hard way, too—that has facilitated the way of the private claimant under the antitrust laws.

And the private claimant includes the attorneys general of the States, and the city attorneys. I am talking about those folks as private claimants, too.

Senator HART. Well, Mayor, you are a powerful advocate. You said you wish you could bring five or six experienced antitrust plaintiff lawyers to join you in the lecture. I wish I could get 99 Members of the Senate to join me in listening.

In defense of their not being here—everybody is supposed to be at five other places, wherever they are, but I would think it would increase enormously, the likelihood of favorable action on this bill if we could all hear you.

Since you were talking to the converted, I do not have any questions.

Mr. O'Leary?

Mr. O'LEARY. Mayor, as you know, the nolo contendere portion of the bill has run into substantial resistance. If, in lieu of title V, the nolo contendere portion, we were to consider legislation which would permit private plaintiffs to have access to grand jury documents and testimony which the employees of the defendant gave before the

grand jury after a plea of nolo contendere, what effect, if any, do you think that would have with respect to private treble damage litigation?

Mayor ALIOTO. I think you ought to enact a nolo contendere bill, as it is enacted, and I think you ought to do that, too. I think you ought to do both of them.

As a practical matter, we can get the grand jury testimony by indirect, those of us who you know work at this stuff and who never quit in these cases regardless of what happens to us in the courts. We can get that by a simple motion to produce the documents that they gave the grand jury or you can get that by asking whether they testified before grand juries and what their recollections may have been about that.

It would, however, facilitate it; you can get it in an easier way, rather than the expensive way, because one of the things about litigation in the Federal courts now, it is just too damn expensive.

Now, we stood around and out of this for awhile but I sometimes act as a utility infielder for my law office, particularly my sons; when they cannot cover a 1-day's job or something like that, I will sometimes show up for them.

You sit around; one lawyer for the plaintiff, one witness and about 25 lawyers sitting around representing all of the defendants; all of these folks sitting around, costing $60 to $100 an hour and they go through laboriously trying to prove the existence, the custody, existence and location of documents that your suggestion would give them almost immediately.

I think it would be a good idea, but ought not take away the portion of the bill that provides that nolo contendere is no different than the plea of guilty. As a realistic matter, how long can a system—you know, whether a collusive price fixer is a pickpocket; a pickpocket who happens to be a pillar of the community. He is sometimes referred to in our circles as an unarmed robber.

But, you know these collusive price-fixing cases involve millions and millions of dollars and how does it look in our police courts when somebody who steals a coffee pot on a Federal reservation or the territory of the military, we force him to plead guilty, we send him to jail and we force some polite fellow who is engaged in an electrical type of conspiracy where they paid $600 million in damages, and that is only a small portion of what they really took away in those cases.

We let some of those folks plead nolo contendere as though we are going to have a different rule for you as against others. I just think it brings the whole matter of law enforcement into disrepute.

I think you ought to go ahead on the nolo contendere and give us the right to get the grand jury minutes as well, after the plea of nolo contendere.

Mr. O'LEARY. Thank you, Mr. Chairman.

Senator HART. Mr. Chumbris?

Mr. CHUMBRIS. Thank you, Mr. Chairman.

In the question that Mr. O'Leary just asked you, the suggestion came from David Shapiro who was one of the plaintiff attorneys in the *Tetracycline* case.

Mayor ALIOTO. Yes, Mr. Shapiro handled the drug cases.

Mr. CHUMBRIS. Yes. And he is the one who suggested that we should not amend the nolo contendere bill as you have suggested but it would

be helpful for the trial of the case if they could get the documents easily; a different point of view.

Mayor ALIOTO. It is not different, I agree with both. I agree that we ought to have the nolo contendere plea and we ought to have the documents; I agree with both of them.

Mr. CHUMBRIS. Well, he suggests only the one, and leave the law as it is on the other. And I think you have read where Assistant Attorney General Kauper stated that he is against the nolo contendere amendment on the basis that it affects the Department of Justice in fulfilling its responsibilities in the enactment of antitrust cases.

Mayor ALIOTO. May I make a practical observation on that as one who has been in this vineyard for a long, long time now?

For reasons which are inexplicable to me, the Department of Justice lawyers do not cooperate and do not particularly want to cooperate or like the private antitrust law for reasons that are absolutely inexplicable to me.

Even the former head of that Department, Judge Stanley Barnes. In Government cases, he is great; he is a great antitrust judge. In private cases, he knocks off every private claim if it gets anywhere near him. He wrote the "Klor's Decision," he wrote that of which I talked about a little earlier.

We always say that there is a 10-page opinion, 9 pages of great encomiums of the antitrust laws, the importance of the antitrust laws, and then on the 10th page, he reverses the verdict for the plaintiff on some grounds that we think is specious and the Supreme Court, as a matter of fact, had held to be specious.

So we appreciate the view of the Department of Justice, of course, but I do not believe it is true that folks are going to stop pleading nolo contendere because those judgements are going to be prima facie proven, that they are actually going to try more of the cases because the Department of Justice, these days, will not even bring an antitrust case unless they have a motion picture of the fellow sitting in the room and rigging the prices; they will not even bring the case these days.

In that type of case, you know you are going to get a plea. And by letting them plea nolo contendere, you are simply letting them off the easy way and you do not apply that uniformly across the board to all people convicted of illegal conduct.

I do not think he can demonstrate that fact, as I see they are bringing so few cases these days anyway.

You see, what happened to antitrust enforcement, it suffered greatly because of John Mitchell, to tell you very frankly—if you want me to be frank here. John Mitchell started treating antitrust cases like they were pieces of merchandise to be sold in the marketplace. The only thing wrong with that is, he did not know the value of his merchandise; the prices he got were too low. He really did not know the value of his merchandise.

But, you know, it became an absolute dead letter. And so, I would not be worried about that. One other thing on that, we got a court to hold that a private plaintiff can get divestiture—the *General Telephone* case.

The Court of Appeals for the Ninth Circuit just knocked that out and said the Government can get divestiture but a private person can-

not. There is nothing in the statute that distinguishes an injunction action brought by the Government as distinguished from an injunction action brought by a private party. That is another thing you might want to think about.

Let the private party, whether it be a State attorney general or a private party representing others because there is curious phenomenon happening. Since 1960, suing the big corporations under the antitrust laws is a phenomenon that did not exist prior to 1960.

The big corporations have the best motive in terms of self-interest, to point out that certain mergers ought not to take place. To deny them the right—the individual, or an attorney general, or a city attorney—to bring a divestiture case in an obvious situation when the Department of Justice is not going to move on every case, is, I think, crippling, again, the antitrust law enforcement in a way that Congress never intended.

There is nothing in the congressional statutes that says that divestiture is different for Government as against individuals, but the courts just said so. The district court agreed with us on that. It is a case where General Telephone took over the Hawaiian Telephone Co., and a lot of suppliers felt that they were going to lose their right to supply the Hawaiian Telephone Co., and the divestiture suit got the district court to divest the merger.

The Court of Appeals of the Ninth Circuit just said a couple of weeks ago—that was one of our cases—"You cannot do that, a private party cannot divest." Who said so—some court? Congress never said that.

And you ought to give a party bringing an injunction suit the right to bring a private injunction, have a mandatory injunction of divestiture as well. They are sometimes better motivated for that and the court is not going to grant divestiture except in the very, very obvious case. That is very, very clear.

So with all due respect to Mr. Kauper's opinion on the matter of nolo contendere, I do not think he can back up what he says is going to happen; I do not think he can back that up.

Mr. CHUMBRIS. It is too bad you were not here yesterday, because yesterday we had a strong advocate for his position on the particular bill and you are equally a strong advocate on your position of the bill.

Mayor ALIOTO. Why do you not invite us back together?

Mr. CHUMBRIS. If you had been side by side yesterday, it would have been a show that we could retelevise time and time again.

Mayor ALIOTO. Bring us back together. I would be delighted to appear with anybody who says that making a nolo contendere plea——

Mr. CHUMBRIS. Well, his testimony applied to the whole bill.

Mayor ALIOTO. I enjoy debating with Dr. Handler. He also happens to be a very good friend of mine. The last time I saw Dr. Handler he was buying two pairs of pants, not one; two pairs of pants up in the store on 5th Avenue. I told him at that time, he was getting six-fold damages with those clothes just off 5th Avenue before they brought that price-fixing case up there and the clothes had been subject to price fixing. He gets six damages if he has two pair of pants. That would be double damages, times three. He gets 6 to 1. I have that kind of a relationship with Dr. Handler and I would be delighted to appear side by side with him at any time.

Mr. CHUMBRIS. The reason I bring this point up is, that for the 100 jurors who will have to decide this issue, listening to Dr. Handler on one side of the issue and to you on the other side will make it a tough job for them.

Thank you very much.

Senator HART. You have made so many points. One that I think always hits a nerve with me—and it is not raised often enough—you reminded us again of the differing treatment that is accorded the pillar of the community and the kid from the back alley, and the effect it has upon respect for law, and it is so true.

Thank you very much.

Mayor ALIOTO. Thank you very much, Senator, I appreciate it and I want to thank you on behalf of the Conference of Mayors because, as I say, vigilant enforcement of the antitrust laws is very important to the citizens; very important. Thank you very much.

[The prepared statement of Mayor Alioto follows. Testimony resumes on 364.]

PREPARED STATEMENT OF MAYOR JOSEPH L. ALIOTO

Please accept this as my preliminary statement on two sections of Senator Hart's commendable bill to improve and facilitate the expeditious and effective enforcement of antitrust laws.

We have had a plethora of decisions from the Federal Courts throughout the United States. They are decisions that have placed important enforcement procedures in a zone of confusion. It is appropriate the confusion be dissolved by legislative pronouncements on significant elements of antitrust enforcements.

I wish to speak to two elements in the bill.

One: Title Four relating to parens patriae and Title Six relating to the plea of nolo contendere.

As to parens patriae: In the decision of the Supreme Court in Hawaii vs. Standard Oil Company of California, the Court denied the State of Hawaii the right to sue as parens patriae, remitting it to its remedies for proprietary damages and as a leader in the class action suit. The effect of this decision was to deprive the "private attorneys general" of an effective tool to fight collusion on the pricing of consumer goods. Thus, the effectiveness of the private action as a means of enforcing the antitrust policy of the United States was lessened by a judicially created restriction.

Standing to sue in the capacity of parens patriae must be granted to dilute the effects of this decision.

I believe it unsound to accept the argument that procedural rules relating to class actions make parens patriae unnecessary. The courts are rejecting many motions for class actions on the ground that the class would be so large and diverse as to make adjudication of the individual claims of each consumer impossible. An obvious example would be a collusive price fixing conspiracy on the retail price of gasoline.

The hundreds of thousands of injured citizens who are users of refined petroleum products would obviously be unable to join in a class action. Individually, their injuries are so small that realistically, and historically, it cannot be contemplated their claims will ever be brought. Thus, price fixing companies would be permitted to retain the bulk of the revenue which they extracted unlawfully from the consuming public.

The Hart Bill would close this conspicuous loophole.

In Georgia vs. the Pennsylvania Railroad Company, 324 U.S. 439 (1945) the Supreme Court held that the State of Georgia had the right to bring a suit as parens patriae on behalf of all, or even a substantial portion of its citizens. However, the same court in Hawaii vs. Standard Oil diminished the full impact of the Georgia ruling by deciding the state as parens patriae had no standing under the antitrust laws. Until *Hawaii* we had assumed the concept of parens patriae, derived from the English Constitutional System, was available to assert widespread antitrust violations affecting large amounts in the aggregate but small amounts to the numerous involved individuals.

Until *Hawaii* the nature of the parens patriae suit had been greatly expanded in the United States, admittedly beyond that which existed in England.

The practical matter is that the failure to enact the Hart amendment to the antitrust laws leaves antitrust malefactors with huge windfalls when their collusive price activities cover a multitude of persons.

As to the plea of nolo contendere:

1. By judicial interpretation nolo contendere has been taken outside the scope of Section Five of the Clayton Act.

2. It has been a convenient device for collusive price fixers, permitting them to escape the damages they have caused countless victimized consumers.

3. The judicial restriction on the plea of nolo contendere has resulted in long civil trials which have discouraged private claimants from prosecuting legitimate grievances.

4. There is no difference between a plea of guilty and a plea of nolo contendere. Thus, there should be no difference between the two pleas for purposes of antitrust enforcement.

5. Senator Hart's amendment would rectify a judicial error of long standing, an error which arose during the days when the courts were more sedulous in the protection of violators than in preserving the rights of victimized consumers.

Senator HART. Our next witness is the vice president of National Economic Research Associates, Mr. Peter Max.

Mr. Max, good morning.

As was the case with the mayor, Mr. Max, you proceed as you would like. We will order your statement printed, in full, as though given.

STATEMENT OF PETER MAX, VICE PRESIDENT OF NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC., WASHINGTON, D.C.

Mr. MAX. Thank you very much, Senator. I do have a prepared statement [1] which I would like to tender for the record.

I would like to take just a few moments to summarize what I think are, perhaps, some of the high points therein.

It is my sincere pleasure to appear before this committee at the chairman's request to attempt to contribute my thoughts on parts of S. 1284.

I have been involved as an economist in over 70 antitrust cases. And my statement today reflects that experience as well as research we recently have undertaken pertaining to antitrust enforcement.

I will focus my comments on title IV and title VI, considering them in reverse order. And, in addition, I would like to make one brief comment with regard to a portion of title VII.

As to title VI, on balance, I favor this proposed amendment to the Clayton Act, but I have several doubts as to its efficacy. There are several reasons for these doubts.

At least, until now, Federal criminal antitrust prosecution has not been the major means of antitrust enforcement in this country.

Unless there is a major change in the badly budget-constrained level of Federal enforcement activity, this amendment will not do much to increase the effectiveness of enforcement, and, possibly, could have an adverse impact on enforcement levels.

The substantial number of significant private actions in recent years which did not benefit from prima facie evidence from a prior Federal suit suggests that the private bar, including, of course, State

[1] See p. 371.

attorneys general, has not been unduly hampered by the lack of this provision.

Finally, the depth and breadth of discovery in major private suits often yield much more evidence than is required for a Federal criminal case, and most plaintiffs, absent settlement, find great benefit in laying their evidence before the trier of fact.

Let me, briefly, elaborate on each of these four points.

With regard to the level of Federal antitrust activity, consider the recent history of enforcement by the antitrust division.

Over the past 10 years, the Government has filed an average of only 58 antitrust cases, both criminal and civil, per year.

On average, only 15 of these have been criminal cases, and most criminal cases have related to price fixing.

So, title VI is, in actuality, an attempt to make nolo pleas in a specific type of case—price fixing—prima facie evidence in civil cases. This is one reason why I favor this legislation.

I should point out that the level of activity of the Antitrust Division, probably, is more a function of congressionally determined budgets than a lack of desire for active enforcement.

From our analysis, it would appear that the Division is maximizing its caseload, given its budget.

In recent years, while the Justice Department has been filing well under a hundred antitrust suits each year, the efforts of State governments and the private bar have resulted in an increase in private suits from less than 500 per year 10 years ago, to well over a thousand per year in the last few years.

Not only has the private bar been far more active by this measure than the Antitrust Division, but a case can be made that the former recently has been effective both in detecting price fixing and, if penalties are a deterrent, much more effective in creating the deterrent. This deterrent, of course, is not criminal penalties but, rather, damages.

The potential importance of this amendment, perhaps, is cast in perspective by the following:

In the last 10 years the Antitrust Division has filed 149 criminal suits. Our count shows that 681 firms and 424 individuals were indicted.

Of the 617 firms whose cases were disposed of, at least, at the trial level, nearly 86 percent pleaded nolo.

The pattern for individuals is similar. Of the 372 individuals whose cases were disposed of, slightly over 90 percent pleaded nolo.

Enactment of title VI would probably lead to some combination of two results.

Some defendants, of course, would continue to plead nolo and others, who would otherwise have so pleaded, would plead not guilty and, potentially, stand for trial.

It has been suggested by other witnesses that this would result in a sharp increase in the number of trials, further taxing the Antitrust Division's limited resources.

Two observations seem in order.

If the Division's resources were not expanded, the result could be a reduction in the number of indictments, an event certainly, contrary to the overall goals of S. 1284.

On the other hand, Federal criminal antitrust cases usually are hard-core cases with evidence well developed prior to the issuance of an indictment.

Consequently, trial in such a case may involve relatively little incremental effort and, thereby, relatively little more resource allocation by the Division.

With regard to the benefits to private plaintiffs, as I mentioned, the overwhelming bulk of antitrust cases are cases filed by private plaintiffs.

Detailed information on the sales involved and the amount of settlement is sparse. However, some examples, certainly, are available. Some of them have already been cited.

The recent settlements in *Tetracycline* cases amounted to over $195 million; The *Gypsum* cases, mentioned by Mayor Alioto, settled for about $75 million; large awards also have been obtained in suits which are not class actions; The *Western Asphalt* cases recently were settled for over $24 million; the *Oklahoma State Asphalt* case was tried to a jury which found damages, after trebling of $4.9 million, and a case in Washington State, in as unusual an industry as the mint oil industry, recently was settled, prior to trial, for over $13.5 million.

These amounts can be contrasted to the $11.9 million in total fines collected in criminal antitrust cases over the last 10 years in aggregate.

If monetary penalties are a means to preventing antitrust violations, the threat of successful damage actions, clearly, by private plaintiffs must be, by far, the most effective deterrent extant.

And the significant point in this recitation of private suits is, that many of the cases I have just mentioned, and many others, did not benefit from prior Government action.

These cases resulted from the actions of the State attorneys general, and members of the private bar.

Finally, as to title VI, I have some doubt as to the value of prima facie evidence in many, if not most, private suits.

Other witnesses, particularly yesterday, have touched on this point, and I shall not elaborate on it at length, but I would point out that discovery in private suits is often protracted. For example, discovery ran over 6 years in *Western Asphalt*, over 5 years in the *Mint oil* case I just mentioned, and over 6 years in *Tetracycline*.

When discovery is this extensive, obviously, by the time trial comes around, plaintiff's counsel is well prepared on the merits, as is defendant's counsel.

Sure, a plaintiff's counsel would like to have a prima facie case going in. However, given the depth of discovery, plaintiff's strategy, probably, more often than not, would be to attempt to lay before the court all the proof the Government had and as much more as possible.

Under such a strategy, the prima facie value of a prior plea of nolo may be rather small.

Nevertheless, since it appears to me that title VI, primarily, would go to hardcore price fixing, I favored its adoption.

Let me say a few words about title IV.

I, generally, favor the thrust of these provisions, but I do not favor certain subsections, and have substantial difficulty with the workability of one portion.

Specifically, section 4D, which would permit the Attorney General to become parens patriae of persons residing in those States wherein State action is not taken, should be deleted, in my judgment. I have elaborated on the reasons in my prepared text.

I believe, further, that the parens patriae provision should not include corporate persons, and should be limited to natural persons and political subdivisions. I will not elaborate on that, but, simply refer to my prepared text in that regard.

Section 4C(c) relates to the proof of damages. There, I feel, there should be substantial modification or, perhaps, deletion.

And, finally, I wish to comment on a provision permitting collection of damages to the general economy of the State. I feel that section is fraught with peril, and could become a morass to plague the efficient administration of justice.

With regard to section 4C(1), on the proof of damages, as I understand it, this section provides it shall not be necessary to prove individual claims of persons or political subdivisions. It is the so-called class recovery or fluid class recovery. And, further, would codify the use of, "statistical or sampling methods," "prorata allocation" of overcharges, and "such other reasonable system of estimating aggregate damages."

I see no reason to abandon the present rules regarding proof of damages just for parens patriae suits, with one possible exception.

First, specific proof of injury or impact, and specific proof of the amount of injury or damages should be required to the maximum feasible extent.

For the most part, yet with some horrendous exceptions to be sure, it appears that the courts have effectively resolved the substantial difficulties encountered when a plaintiff's expert attempts to reconstruct a "but for" world.

This is not to minimize the problem, for, indeed, it is formidable. But as the law has evolved, a rough balancing of plaintiff's rights and defendant's rights has been achieved.

Plaintiffs, presently, are not precluded from using samples and statistical methods. Mayor Alioto touched on this in his remarks this morning. But there are valid and invalid samples, and better and worse statistical methods.

The adversary system provides the mechanism for sorting out one from the other. The problems are complex, and, in my judgment, the samples or statistical methods appropriate in any single controversy depend heavily on the facts of that controversy.

Hence, I conclude that permission to use statistical or sampling methods by statute would unnecessarily introduce an undesirable, vague, and imprecise standard of proof into antitrust damage actions.

What about in a case of parens patriae where the allegation is, say, overcharges of a nominal amount per unit on a widely sold consumer product? In this situation, proof of purchase by an individual purchaser, especially a natural person, may be a virtual impossibility. Yet, public policy should not permit the alleged offenders, if proven to be offenders, to retain their ill-gotten gains.

A dilemma is presented and, I feel, the solution may be difficult to codify. I suggest, however, that the committee consider a provision,

not which permits fluid class recovery, but, rather, a provision which states that such an approach shall not be prohibited by the courts where proof convinces the trier of fact, that only by permitting such a means of recovery, will the ends of justice be met. The burden of such proof should rest upon the advocate of such an approach, most certainly, the plaintiff.

With regard to damages to the general economy of a State, as an economist who has struggled long and hard with the myriad problems of antitrust damages quantification, I have substantial doubt about the desirability of this provision.

To begin with, the terminology, by necessity, is vague and amorphous. Quantification of such damages could present problems far beyond anything heretofore encountered in antitrust litigation.

Take, for example, what might transparently appear to be a straightforward set of hypothetical facts.

Suppose it were established that, by virtue of conspiracy, prices to a local government were above competitive levels by 10 percent on half its purchases. One could find that, as a result, taxes were inflated by 5 percent.

An imaginative economist might conclude that, as a result, the affected community lost certain business activities because of its high taxes, and thus this locale suffered adversely. Payrolls should have been higher, employment greater, and so forth.

Note that the damage to the plaintiff community's economy might be equal to and offset by the benefit to another community, in or, perhaps, out of the plaintiff State.

What are the damages in such a circumstance? Lost wages and salaries, probably, yes. But for how many years? And what of the multiplier effect? More jobs beget still more jobs both in support and in allied industries and in retail trade generally. How far is the chain of impact to run? What standards of proof should be applied?

These questions are far too difficult to answer with a degree of certainty presently, and, in my judgment, appropriately required.

I would urge deletion of this section.

One final comment on a portion of title VII.

Title VII, among other things, would amend the Clayton Act by adding a new section 21 on complex cases. The thrust of this section I applaud. However, I seriously question such use by the courts of economic experts, especially if the provision contemplates, as it seems to do, exparte use of such experts.

Unfortunately, or, perhaps, fortunately, economics is still far, far from a hard science. Economists' interpretations of the same set of facts often vary.

These differences in antitrust cases are best resolved by the adversary process. The court's expert, most probably, would not be subject to this process, in which event, in my judgment, the ends of justice rarely would be enhanced by this provision.

Thank you.

Senator HART. Thank you, Doctor, for an overall presentation that is interesting, but, particularly, for the details that you have given us of the history of Government and private antitrust enforcement results.

I doubt we have ever had it presented this way before.

Mr. MAX. Thank you, Senator Hart.

Senator HART. Mr. O'Leary?

Mr. O'LEARY. Doctor, on——

Mr. MAX. Mister. Mister, please, Mr. O'Leary. I just got my degree conferred by the Senator, but I am giving it back. It is Mister Max.

Mr. O'LEARY. All right.

Mr. MAX. Thank you.

Mr. O'LEARY. Mr. Max, on pages 14 through 17,[1] you discuss section 4C which deals with the proof of damages, and you also, earlier in your statement, mentioned your involvement with a number of antitrust cases.

Have you testified on behalf of a plaintiff who was attempting to prove damages by the use of statistical or sampling methods?

Mr. MAX. Yes, and also for defendants defending against the same approach, but not yet in the same case.

Mr. O'LEARY. I wonder if you could give us the benefit of your experience, and sort of tell us what courts presently permit and where they draw the line.

Mr. MAX. It is awfully risky to generalize in an answer to such a question, of course, but I would say that, particularly in the last few years, there has been, certainly, a liberalization. The use of computers had become more predominant.

The rules for complex cases recognize this, and they are appropriate rules and, where applied, work very well because they require both sides to reveal their complicated computer studies early, and so forth and so on.

Now, in several instances of which I am aware, the court has, in effect, compelled the parties to hammer out between them their most complex statistical problems or areas of methodological disagreement. And in some instances the court will appoint a middleman or an arbiter on the technical point. And that is fine because that is an adversary proceeding which, hopefully more often than not, will result in a satisfactory outcome.

And that system works as far as I am concerned. What I am frightful of is, if we have a provision in the law such as the one proposed here that, sort of, willy nilly, says you can use it without defining what the standards have to be, the standards will fall. And I think that would be bad. There have been enough, as I mentioned in my testimony, horrendous examples, in my judgment, already. But I think we are a lot better off having it litigated rather than having somebody say, "Yes, but the law says I can use a statistical sample."

Mr. O'LEARY. If I understand you correctly, you seem to be saying, "Well, let's keep the present state of the law on damages as it is, but let's tell the courts that we are not prohibiting the use of statistical or sampling methods."

Mr. MAX. You do not need to tell the courts that because there is no prohibition on it now.

Mr. O'LEARY. Right. With respect to fluid recovery, if the State attorney general can sue parens patriae, and he can prove, through the defendant's records, that he had a certain amount of sales in a State

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[1] See pp. 375–376.

for the period in question, and he can also prove the amount of the overcharge, does it offend you that a State attorney general, via this bill, might be able to multiply the sales, times the overcharge, times three, even with, at that stage, he does not know who his injured consumers are in that State?

Mr. MAX. It is hard, again, to generalize. What I am arguing for is this: I think that to the maximum extent feasible, plaintiffs should be required to prove their purchases.

And you will run into circumstances, such as the one—it is implicit in your question—where that is not possible. Now, when that happens, I say put the burden of proof on the plaintiff and let the court become convinced that it is not possible, and then, and only then, I feel that the fluid class recovery system should be followed.

Mr. O'LEARY. Well, if we take the *Tetracycline* cases and assume that there had been a trial on the question of liability, the defendants had been found liable, and the court proceeded in that fashion as it did in the settlement, does that bother you?

Mr. MAX. That one comes closer to bothering me. I am not familiar enough with the facts with regard to what may or may not have been provable in terms of purchases. I believe that, for some of the non-consumer classes, estimates were used as well, and that tends to bother me.

But I am not sufficiently familiar with the facts in that case to say they could have proved it and should have been compelled to prove it.

Mr. O'LEARY. Well, it is my understanding that, in that case, individual consumers, in effect, filed something with the clerk of the court which said for x period of years they bought x period of drugs, and then the records of the retail druggist were used to substantiate the claim of the consumer that he had, in fact, made those purchases.

Mr. MAX. That is fine by me. I mean, you know, then he has proved that he bought the stuff.

Mr. O'LEARY. Right. Now, with respect to the fact that, perhaps, you cannot find or identify all the consumers who may have been injured, and you take the remaining funds and, as in that litigation, you allocate those funds to drug abuse programs, et cetera, in the State, does that bother you?

Mr. MAX. No, particularly if the alternative is to give them back to the defendants. But I would point out with just one footnote to your commentary, Mr. O'Leary, on those cases, as you know, they are now, the remaining cases—or most of the remaining cases—are at trial and have been for several months.

However, I would point out that the issues have been adjudicated three times, to my knowledge, always with the finding, ultimately, for the drug companies; twice criminally in New York—that is really once, two trials—ultimately to the vindication of the drug companies, and one civilly in North Carolina with the finding for the defendants.

Mr. O'LEARY. Despite that, they have seen fit to pay out $195 million?

Mr. MAX. That is, certainly, a fact.

Mr. O'LEARY. Mr. Max, opponents of this legislation have argued that the private treble damage plaintiff is following in the wake of a successful Government prosecution and since the original case was made at the taxpayers expense, this legislation would have the principal effect of enriching the lawyer for the plaintiffs.

In this regard, table 6,* which is attached to your statement, is really pretty enlightening. It is surprising to see the number of cases brought by the plaintiff's bar which do not follow in the wake of a Government suit.

Mr. MAX. I would point out, Mr. O'Leary, in that connection, that this information is tough to come by. It is very difficult to find a systematic way, short of a massive survey, to put together a comprehensive list.

What we did in this instance, we began with cases, pretty much, that we knew about, and cases where we were trying to get dollar amounts, where we either had direct knowledge because we, ourselves, had been involved, and about the only other place, usually, where the dollars come out, is if there was a protracted fee hearing.

So that this is but a gleaming and does not purport to be comprehensive, and there is one heck of a lot of very important cases which have no bearing on what was done in the Justice Department. And you can almost pick any one of the larger ones, for example, and look at those dollars in comparison to the $11 million Justice had collected in fines over 10 years.

Mr. O'LEARY. Thank you, Mr. Chairman; I have no further questions.

Senator ABOUREZK [presiding]. Mr. Chumbris.

Mr. CHUMBRIS. Thank you, Mr. Chairman.

Mr. Max, today, most of the witnesses will be testifying in favor of the bill. But yesterday, we did have Milton Handler and Mr. Jerome Shapiro who testified as strong advocates of their position against the bill.

I have no questions to ask of you except to state that the subcommittee will review your testimony and that of all of its witnesses, in toto. Today happens to be the day when only proponents of the bill are present.

Mr. MAX. I quickly glanced over Milton Handler's testimony, and I wish I had more time.

Mr. CHUMBRIS. Thank you very much.

Senator ABOUREZK. Thank you very much.

Mr. MAX. Thank you, sir.

[The prepared statement of Mr. Peter Max follows. Testimony resumes on p. 387.]

PREPARED STATEMENT OF PETER MAX, VICE PRESIDENT, NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC.

It is my sincere pleasure to appear before this Committee, at the Chairman's request, to attempt to contribute my thoughts on parts of S. 1284. I have been involved, as an economist, in over 70 antitrust cases [1] and my statement today reflects that experience as well as research we recently have undertaken pertaining to antitrust enforcement.[2] I shall focus my comments on Title IV (*Parens Patriae*) and Title VI (*Nolo Contendere*), considering them in reverse order. In addition I shall comment briefly on a portion of Title VII (Miscellaneous).

TITLE VI

Title VI, as I understand it, would make *nolo* pleas *prima facie* evidence of a violation in a civil case subsequent to a federal criminal action. On balance, I favor this proposed amendment to the Clayton Act, but I have several doubts as to its efficacy. There are several reasons for these doubts.

*See p. 385.

[1] A partial list of these cases is appended hereto.

[2] See, "Tougher Antitrust Policy: Would It Curb Inflation?" an address by Peter Max before the Washington, D.C. Chapter of the National Association of Business Economists, January 22, 1975.

1. At least until now, federal criminal antitrust prosecution has not been the major means of antitrust enforcement.

2. Unless there is a major change in the badly budget-constrained level of federal enforcement activity, this amendment will not do much to increase the effectiveness of enforcement, and possibly could have an adverse impact on enforcement levels.

3. The substantial number of significant private actions in recent years which did not benefit from *prima facie* evidence from a prior federal suit suggests that the private bar (including, of course, State Attorneys General) has not been unduly hampered by the lack of this provision.[3]

4. The depth and breadth of discovery in major private suits often yield much more evidence than is required for a federal criminal case and most plaintiffs (absent settlement) find great benefit in laying *their* evidence before the trier of fact.

The Level of Federal Antitrust Activity

Consider the recent history of enforcement by the Antitrust Division of the Department of Justice. As shown by the data on Table 3, over the 10 years since 1965 (fiscal year) the government has filed an average of only 58 antitrust cases (both criminal and civil) per year,[4] although there has been an apparent increase in activity in recent years. On average, only 15 of these have been criminal cases and most criminal cases have related to price fixing so Title VI is, in actuality, an attempt to make *nolo* pleas in a specific type of case—price fixing—*prima facie* evidence in civil cases. This is one reason why I favor this legislation. In the last decade usually only about 40 individuals have been indicted in each year (See Table 3). However, in the last two years, there has been a sharp rise in the number of criminal indictments. The details of the cases filed in 1973 and 1974 are set forth on Table 5.

The apparent increase to 20 cases in 1973 and 34 cases in 1974 should be viewed with some caution because some "cases" overlap and reflect a common set of facts and/or a single investigation by the Justice Department. In 1973, the 19 criminal price fixing cases include two suits involving microscopes in San Francisco and three cases involving nylon twine in Memphis and Birmingham. In 1974, seven of the 21 criminal price fixing cases related to highway contractors conspiring in Illinois; there were also two paper label cases in San Francisco and three reinforcing steel bar cases in Texas.

Two observations are in order regarding simply the number of cases filed by the Antitrust Division. The numbers alone can be misleading since cases of the magnitude of the currently pending civil actions against IBM and against AT & T can be extremely far-reaching both in terms of potential direct impact on the industries involved and in terms of the deterrent effect on large firms in other industries.

Second, the level of activity of the Antitrust Division probably is more a function of Congressionally determined budgets than a lack of desire for active enforcement.[5] Consider the data set forth on Table 4. In fiscal 1965, the Division's budget was just over $7 million; by fiscal 1974 it had risen to $13 million. Over the same time span the number of cases rose from 43 to 67 so that there was a modest increase of only 18 percent in the average dollars of budget per case filed. Thus it would appear that the Division is maximizing its case load, given its budget.

In recent years, while the Justice Department has been filing well under 100 antitrust suits each year, the efforts of state governments and the private bar have resulted in an increase in private suits from less than 500 annually ten years

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[3] As mentioned by previous witnesses Kauper, Riehm and Wilson. As directly contradicted (incorrectly) by Professor Adams (p. 2). Thus, I find myself in accord with the previous testimony of Messrs. Kauper, Riehm and Wilson. I contend that recent history tends to establish that the impression of ineffectuality created by Professor Adams' testimony is incorrect, viz: "By entering such a plea, therefore, the defendant effectively precludes the filing of numerous triple damage actions, because these can realistically be attempted only where the plaintiff is able to rely on a final judgment in prior government action as prima facie evidence. In short, the nolo plea becomes a protective device which enables the antitrust violator to short-circuit the imminent threat of triple damage remedies for the victims of his misfeasance."

[4] This number is somewhat misleading since often Justice files companion civil and criminal cases and also frequently files a multiplicity of civil actions generally relating to the same set of facts. (See, for example, the recent West Coast sugar cases wherein three criminal indictments were handed down along with two civil complaints.

[5] S. 1136, now pending, which, over 3 years, would triple the budgets of the Antitrust Division and the Federal Trade Commission, seems to be clear recognition of this situation

ago to over 1,000 in the last few years.[6] Not only has the private bar (including State Attorneys General) been by far more active by this measure than the Antitrust Division, but a case can be made that the former recently has been effective both in "detecting" price fixing and, if penalties are a deterrent, much more effective in creating the deterrent; [7] this deterrent, of course, is not criminal penalties but rather damages which, if awarded after trial, equal three times the amount of overcharges to the plaintiffs resulting from anti-competitive activities.[8]

The potential importance of this amendment perhaps is cast in perspective by the data shown on Tables 1, 2 and 3. In the last 10 years, the Antitrust Division has filed 149 criminal suits. Our count shows that 681 firms and 424 individuals were indicted. The cases for 73 of the firms and 59 of the individuals are still pending. Of the 617 firms whose cases are disposed of (at least at the trial level), 530 (85.9 percent) pleaded *nolo contendere* and 52 (8.4 percent) pleaded not guilty. Of this latter group 27 were found innocent and 25 were found guilty. Finally, 12 firms pleaded guilty (all in 1974 and all in related cases, after *nolo* pleas were rejected by the trial Judge) and 23 indictments were dismissed.

The pattern for individuals is generally similar. Of the 372 individuals whose cases are disposed of, 336 (90.3 percent) pleaded *nolo contendere*, and 32 (8.6 percent) pleaded not guilty. Twenty of these were found innocent and 12 were found guilty. Only one guilty plea was entered by an individual and three indictments were dismissed.

Enactment of Title VI would probably lead to some combination of two results. Some defendants, of course, would continue to plead *nolo* and others who would otherwise have so pleaded would plead not guilty and potentially stand trial. It has been suggested [9] that this would result in a sharp increase in the number of trials, further taxing the Antitrust Division's limited resources. Two observations seem in order: if the Division's resources were not expanded, the result could be a reduction in the number of indictments, an event certainly contrary to the overall goals of S. 1284; on the other hand, federal criminal antitrust cases usually are "hard-core" cases with evidence well developed prior to the issuance of an indictment. Consequently, trial in such cases may involve relatively little incremental effort and thereby relatively little more resource allocation by the Division.[10]

Benefits to Private Plaintiffs

As mentioned above, the overwhelming bulk of antitrust cases are filed by private parties plaintiff. Many of the larger of these cases (in fact, most) have been settled prior to trial. Consequently, detailed information on the sales involved and the amount of settlements is sparse. However, some examples are available and we have summarized these on Table 6. One recent example is in the *Tetracycline* cases. Several classes of plaintiffs have been (or still are) involved; to date the defendant drug companies have paid more than $195 million in settlements.[11]

In the *Gypsum* cases, one private suit [12] was tried with an award of $3 million for the plaintiffs and, subsequently, settlements amounting to approximately $75 million were obtained by private litigants.[13] Another example is the settlement for $10 million by a nationwide class in actions brought against manufacturers and distributors of burglar-protection systems.[14] Large awards also have been

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[6] The data on private suits, just as those for federal actions, involve overstatement since it is not unusual for separate suits to be filed by many plaintiffs on essentially the same set of facts.

[7] It should be noted that often private suits are instituted after a successful government suit. However, particularly in recent years, many important damage cases have been filed where there is no reliance upon a prior federal suit. Current examples include, among others, the *Telex* case, the *Gypsum* cases, the *Western Asphalt* cases and the *Cast Iron Pipe* cases.

[8] The important role that private damage suits has played in antitrust enforcement is widely recognized: "While injunctive relief is generally corrective in form, the treble damage remedy clearly has an important element of deterrence built into it. This element of deterrence has been particularly important as a practical matter because the criminal sanctions in the Sherman Act have been woefully inadequate for generations." Donald I. Baker, "Antitrust Relief and the Role of the Government in Obtaining It," Remarks prepared for Delivery at the Eighth New England Antitrust Conference, Boston, Massachusetts, November 1, 1974.

[9] See page 41 of the Testimony of Assistant Attorney General Kauper.

[10] To the contrary, however, note the Division's experience in Case 1622, *U.S. v. Chas. Pfizer & Co., Inc., et al.*

[11] *The Wall Street Journal*, October 18, 1973.

[12] *Wall Products Co. v. National Gypsum Co.*, 357 F. Supp. 832.

[13] The Bureau of National Affairs, Inc., *Antitrust and Trade Regulation Report*, No. 645, January 8, 1974, p. A-1.

[14] *City of Detroit, et al. v. Grinnell Corp.*, 495 F.2d 448.

obtained in suits which are not class actions. Telex was awarded $260 million in damages, before an offset of $21.9 million, in its suit against IBM [15] and Zenith was awarded nearly $19 million in its suit against Hazeltine.[16] The *Western Asphalt* [17] cases recently were settled for over $24 million, the *Oklahoma Asphalt* [18] case was tried to a jury which found damages of $4.9 million after trebling and a case in Washington State in as unusual an industry as mint oil recently was settled prior to trial for over $13.5 million.[19] Contrast these amounts with the level of fines shown on Table 1. If monetary penalties are a means to preventing antitrust violations, the threat of successful damage actions by private plaintiffs must be by far the most effective deterrent extant. In other words, private suits can result not in fines equalling some *fraction* of the ill-gotten gains, but in damages equalling a *multiple* of those gains.

The significant point in this recitation of private suits is that many of the cases mentioned above did not benefit from prior government action. These cases resulted from the actions of State Attorneys General and members of the private bar. The tortuous history of many of these cases is eloquently summarized by the following words of one of the nation's leading federal judges, the Honorable George H. Boldt who, in the above mentioned mint oil litigation, stated:

"I want to point out that in this litigation there was no indictment, no guilty or *nolo* plea, no government investigation available to the plaintiffs, all of which are often available to the plaintiffs in similar cases. None of those extremely important aids to plaintiffs were available to the plaintiffs and their counsel in this litigation. In these circumstances, plaintiffs' counsel had the extremely difficult problem of searching for evidence to support the complaint prior to a filing in the first place, and thereafter during the several years of discovery searching for further evidence to support plaintiffs' allegations as to both liability and damages. This must have been a Herculean task. Indeed, the vigorous and continuing opposition by defendants' counsel, in a perfectly proper way as they were bound to do for their clients, nevertheless presented very real problems for the plaintiffs' counsel at every step of the way.

"The Dwyer firm has an excellent reputation for integrity, experience and energy in developing and trying cases of this type. However, it is a relatively small firm of about ten lawyers or thereabouts. This firm singlehandedly, as it were, was opposed by equally capable, successful and vigorous attorneys. Each defendant was represented by a different firm in the Seattle-Tacoma area of the highest quality and finest reputation, and in addition, was also represented by one or more distinguished counsel from other areas, New York, Washington, D.C., Chicago, and others.

"To put it simply, as a former boy from Montana would put it, a single firm was opposed by twelve of the ablest firms in this country, making the odds, as I calculate it, twelve to one, or to put it another way, a David and Goliath situation. It now appears that the odds were even, a most extraordinary professional feat.

"I have presided in many anti-trust litigations, several of which were class actions involving the peculiar problems incident to that type of litigation. Up to this time, despite my anti-trust experience all over the United States, I have never seen a single firm, however large, pitted against such an imposing array of the highest type of legal talent. The successful conclusion of this litigation is indeed a high tribute to the Dwyer firm, and to the high standards of legal practice in the Western District of Washington, of which I have always been proud in all my legal travels because I have never found better legal representation anywhere than right here at home. I can't resist stating this publicly of record.

Finally, as to Title VI, I have some doubt as to the value of *prima facie* evidence in many, if not most, private suits. Large private suits (whether or not class actions) most often involve very protracted discovery. For example, discovery ran over six years in *Western Asphalt*, over five years in *Mint Oil* and over six years in *Tetracycline*. These examples are not unusual. Discovery as extensive as is common in private litigation usually will mean that plaintiff's counsel is well

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[15] *Telex Corp. v. IBM Corp.*, 367 F. Supp. 258, Reversed on January 24, 1975 by the Court of Appeals for the 10th Circuit.

[16] *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321.

[17] *In Re Western Liquid Asphalt Cases*, United States District Court, Northern District of California, Master File No. 50173 R.E.S. Civil.

[18] *State of Oklahoma, ex rel. Charles Nesbitt, Attorney General, v. Allied Materials, Corp., et al.*, United States District Court, Western District of Oklahoma, Civil No. 65-344.

[19] *Jack Labbee, et al., v. Wm. Wrigley, Jr., Co., et al.*, United States District Court, Western District of Washington, Civil No. 4029.

prepared for a trial on the merits—as is defendants' counsel. To be sure, a *prima facie* case as to liability would be welcomed by any plaintiff. However, given the depth of discovery, the plaintiff's strategy probably more often than not will be to attempt to lay before the court all the proof the government had and as much more as he possibly can. Under such strategy, the *prima facie* value of a prior plea of *nolo contendere* may be rather small. Nevertheless, since it appears that Title VI primarily will go to hard-core price fixing, I favor its adoption.

TITLE IV

Title IV, as I understand it, would give to the Attorney General of any state the right to sue as *parens patriae* for damages to persons in his state and/or for damages to the general economy of his state.

I generally favor the thrust of these provisions but I do not favor certain subsections and have substantial difficulty with the workability of one portion. Specifically:

1. The provision (Sec. 4D) which would permit the Attorney General of the United States to become *parens patriae* of persons residing in those states wherein state action is not taken should be deleted.
2. The *parens patriae* provision (Sec. 4C(a)(1)) should not include corporate persons and should be limited to natural persons and political subdivisions.
3. The section relating to proof of damages (Sec. 4C(c)) should be substantially modified or deleted.
4. The provision permitting collection of damages "to the general economy" of a state (Sec. 4C(a)(2)) is fraught with peril and could become a morass to plague the efficient administration of justice.

Limit Parens Patriae to States

My opposition to permitting the United States Attorney General to act as *parens patriae* for state citizens is based upon at least two grounds. First, there is more than ample evidence that states can and do very effectively and vigorously prosecute antitrust damages claims. The activities in recent years of California, Washington, Oregon, Arizona, Kansas, Illinois, Oklahoma, New York and New Jersey among others, convince me that states can and do act effectively. Substantial resources are not a necessary prerequisite. Some states (California and New Jersey, for example) do maintain competent in-house antitrust counsel. However, others (Washington, Arizona and Kansas, for example) have very effectively relied on members of the private bar for antitrust counsel with contingent fees as the principal means of finance.

Second, this provision could have the unintended effect of discouraging the growth of antitrust capabilities at the state level. This might dampen the vigor of those states which presently actively pursue antitrust goals and tend to discourage the development of such policies in those states which presently are less active. Neither of these results is consistent with the goals of S. 1284. The resources of the U.S. Attorney General are *now* available and without this provision would remain available to enforce the antitrust laws; but the development of supplementary state resources might be hindered by it.

Limit Parens Patriae to Natural Persons and Political Subdivisions

Limitation of the *parens patriae* provision to natural persons and political subdivisions is desirable principally, I believe, since individuals presently often are unable to pursue relief. I know of no significant evidence which might suggest that aggrieved business entities have been or in the future seriously will be impeded in efforts to redress grievances. Hence, there is no need to further complicate the egal framework of antitrust by this provision.

Modify or Delete the Section on Proof of Damages

Section 4C(c)(1) provides that it shall not be necessary to prove individual claims of persons or political subdivisions (i.e., the fluid class recovery) and further would codify the use of "statistical or sampling methods," "pro rata allocation" of overcharges and "such other reasonable system of estimating aggregate damages."

Proof of damages when the claim is for damages "to the general economy" I consider below as a separate matter.

I see no reason to abandon the present "rules" regarding proof of damages just for *parens patriae* suits, with one possible exception. First, specific proof of injury (impact) and specific proof of amount of injury (damages) should be required to

the maximum feasible extent. For the most part (yet with some horrendous exceptions) it appears that the courts have effectively resolved the substantial difficulties encountered when a plaintiff's expert attempts to reconstruct a "but for" world. This is not to minimize the problem, for it indeed is formidable; but as the law has evolved, a rough balancing of plaintiffs' rights and defendants' rights has been achieved.

Plaintiffs presently are not precluded from using samples and statistical methods. But there are valid and invalid samples and better and worse statistical methods. The adversary system provides the mechanism for sorting out one from the other. The problems are complex and, in my judgment, the samples or statistical methods appropriate in any single controversy depend heavily on the facts of that controversy. Hence, I conclude that permission to use "staticstial or sampling methods" by statute would unnecessarily introduce an undesirable, vague and imprecise standard of proof into antitrust damage actions.

But, what of the *parens patriae* case where the allegation is, say, overcharges of a nominal amount per unit on a widely sold consumer product (the "potato chip" example)? In this situation proof of purchase by an individual purchaser, especially a natural person may be a virtual impossibility. Yet public policy should not permit the alleged offenders, if proven to be offenders, to retain their ill-gotten gains. A dilemma is presented, and I fear the solution may be difficult to codify. I suggest, however, the Committee consider a provision not which permits fluid class recovery, but rather a provision which states that such an approach shall not be *prohibited* where *proof* convinces the trier of fact that *only* by permitting such a means of recovery will the ends of justice be met; the burden of such proof should rest upon the advocate of such an approach—most certainly the plaintiff.

Damages to the General Economy of the State

Section 4C(a)(2) would permit a *parens patriae* suit for "damages to the general economy" of a state or political subdivision. As an economist who has struggled long and hard with the myriad problems of antitrust damages quantification, I have substantial doubt about the desirability of this provision.

To begin with, the terminology, by necessity, is vague and amorphous. Quantification of such damages could present problems far beyond anything heretofore encountered in antitrust litigation. Take, for example, what might transparently appear to be a straightforward set of hypothetical facts. Suppose that it were established that, by virtue of conspiracy, prices to a local government were above competitive levels by 10 percent on 50 percent of its purchases. One could find that, as a result, taxes were inflated by 5 percent. An imaginative economist might conclude that, as a result, the affected community lost certain business activities because of its high taxes and thus this locale suffered adversely. Payrolls should have been higher, employment greater, etc. (Note that the damage to the plaintiff community's economy might be equal to, and offset by the "benefit" to another community—in or perhaps out of the plaintiff state.)

What are the damages in such a circumstance? Lost wages and salaries—probably yes—but for how many years? And what of the multiplier effect? More jobs beget still more jobs both in support and allied industries and in retail trade generally. How far is the chain of impact to run? What standards of proof should be applied? These questions are far too difficult to answer with the degree of certainty presently (and appropriately) required. I would urge deletion of this section.

TITLE VII

Title VII, among other things, would amend the Clayton Act by adding a new Section 21 on complex cases. The thrust of this section I applaud. However, I question such use by the courts of economic experts, especially if the provision contemplates, as it seems to do, *ex parte* use of such experts.

Unfortunately (or perhaps fortunately) economics still is far, far from a hard science. Economists' interpretations of the same set of facts often vary. These differences in antitrust cases are best resolved by the adversary process. The court's expert most probably would not be subject to this process—in which event the ends of justice rarely would be enhanced by this provision.

TABLE 1.—SELECTED DATA ON CRIMINAL CASES INSTITUTED BY THE DEPARTMENT OF JUSTICE FROM 1965 TO 1974

Year	Number of defendants indicted		Minimum commerce involved [2]	Number of defendants fined		Total fines imposed			Total fines as percent of minimum commerce	Jail sentences ordered	
	Firms [1]	Individuals		Firms [1]	Individuals	Firms [1]	Individuals	Total		Number of individuals	Term served
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
1965	72	36	$151, 300, 000	[3] 52	[4] 30	[3] $1, 357, 952. 00	[4] $91, 500	[3,4] $1, 449, 452. 00	0. 96	0	0.
1966	89	60	1, 527, 500, 000	83	59	1, 566, 251. 00	334, 400	1, 900, 651. 00	. 12	1	60 days.
										1	50 days.
										1	30 days.
										1	15 days.
										1	7 days.
										2	1 day.
1967	71	67	527, 600, 000	[5] 63	66	[5] 958, 028. 03	154, 554	[5] 1, 112, 582. 03	. 21	0	0.
1968 [6]	92	39	575, 010, 200	78	31	1, 217, 250. 00	111, 000	1, 328, 250. 00	. 23	0	0.
1969	3	2	27, 000, 000	3	1	100, 000. 00	30, 000	130, 000. 00	. 48	1	6 months.
1970	48	35	1, 079, 800, 000	43	27	676, 800. 00	155, 000	831, 800. 00	. 08	1	3 months.
										6	1 month.
1971 [7]	37	17	812, 320, 000	34	9	535, 000. 00	47, 500	582, 500. 00	. 07	0	0.
1972 [8]	82	50	6, 413, 600, 000	70	46	1, 106, 500. 00	218, 500	1, 325, 000. 00	. 02	1	9 months.
										5	30 days.
1973 [9]	69	51	5, 457, 600, 000	52	31	936, 350. 00	252, 000	1, 188, 350. 00	. 02	4	30 days.
1974 [10]	118	67	5, 231, 440, 000	68	35	1, 739, 500. 00	319, 000	2, 058, 500. 00	. 04	3	6 months.
										2	1 month.
										3	30 days.
Total: 10 yr	681	424	21, 803, 170, 200	546	335	10, 193, 631. 03	1, 713, 454	11, 907, 085. 03	. 05	33	

[1] Includes corporations, firms, and associations.
[2] These figures are absolute minima. When no definite time period of the conspiracy was specified and/or when no figure was given for the defendants' sales in the affected area, no estimate of the minimum commerce involved could be made.
[3] Excludes suspended fine of $1,500.
[4] Excludes suspended fine of $1,000.
[5] Excludes suspended fines of $1,000 and $100.
[6] 1 case involving 5 firms and 8 individuals is pending.
[7] 1 case involving a fugitive is pending.
[8] 2 cases, each involving 3 firms, are pending.
[9] 2 cases involving 15 firms and 19 individuals are pending.
[10] 18 cases involving 47 firms and 31 individuals are pending.

Source: "Trade Regulation Reporter" (Washington ,D.C.: Commerce Clearing House, Inc.), 1965 through 1974. Antitrust Division, Department of Justice.

TABLE 2.—FINAL PLEA AND/OR DISPOSITION IN CRIMINAL CASES INSTITUTED BY THE DEPARTMENT OF JUSTICE FROM 1965 TO 1974

Year of indictment: Defendant indicted	Plea of nolo contendere	Plea of not guilty		Plea of guilty	Dismissed [1]	Total, columns (1) through (5)
		Verdict of not guilty	Verdict of guilty			
	(1)	(2)	(3)	(4)	(5)	(6)
1965:						
Firms [2]	53	12			7	72
Individuals	31	4			1	36
Total	84	16			8	108
1966:						
Firms [2]	79		5		5	89
Individuals	55		4		1	60
Total	134		9		6	149
1967:						
Firms [2]	70		1			71
Individuals	65		1		1	67
Total	135		2		1	138
1968: [3]						
Firms [2]	76		2		9	87
Individuals	29		2			31
Total	105		4		9	118
1969:						
Firms [2]			3			3
Individuals			2			2
Total			5			5
1970:						
Firms [2]	37	5	6			48
Individuals	28	7				35
Total	65	12	6			83
1971:						
Firms [2]	34	3				37
Individuals [4]	12	4				16
Total	46	7				53
1972: [5]						
Firms [2]	72	4				76
Individuals	46	4				50
Total	118	8				126
1973: [6]						
Firms [2]	50	1	2		1	54
Individuals	32					32
Total	82	1	2		1	86
1974: [7]						
Firms [2]	59	2	6	12	1	80
Individuals	38	1	3	1		43
Total	97	3	9	13	1	123
Total, 10 yr:						
Firms [2]	530	27	25	12	23	617
Individuals	336	20	12	1	3	372
Total	866	47	37	13	26	989

[1] Includes nolle prosequi.
[2] Includes corporations, firms, and associations.
[3] Excludes 5 firms and 8 individuals in 1 pending case.
[4] Excludes 1 fugitive defendant.
[5] Excludes 6 firms in 2 pending cases.
[6] Excludes 15 firms and 19 individuals in 2 pending cases.
[7] Excludes 38 firms and 24 individuals in 15 pending cases.

Source: "Trade Regulation Reporter" (Washington, D.C.: Commerce Clearing House, Inc.), 1965 through 1974. Antitrust Division, Department of Justice.

TABLE 3.—ANTITRUST CASES FILED BY THE DEPARTMENT OF JUSTICE AND BY PRIVATE PARTIES 1965–74

Fiscal year	Number of antitrust cases filed and number of individuals indicted by the Department of Justice									Number of private antitrust cases filed in U.S. district courts[1]
	Criminal				Civil				Total criminal and civil	
	Price fixing	Monopolization	Total	Individuals indicted	Price fixing	Monopolization	Merger	Total		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1965	7	1	10	41	13	6	17	33	43	446
1966	12	0	12	43	14	5	14	32	44	444
1967	16	0	17	70	26	6	7	36	53	536
1968	10	1	10	48	9	3	20	40	50	659
1969	13	2	14	28	10	3	26	39	53	740
1970	4	0	5	14	15	11	15	54	59	877
1971	9	2	12	34	14	15	24	52	64	1,003
1972	14	1	15	24	31	13	19	72	87	1,203
1973	19	1	20	42	19	5	16	42	62	1,152
1974	21	3	34	84	10	6	31	33	67	1,230

[1] Data for 1964 through 1972 exclude transfers of cases from one district court to another; data on number of transfers are not available for 1973 and 1974.

Note: Detail may not add to total since some cases involve, for example, both price fixing and monopolization charges while other cases such as contempt proceedings are not separately shown.

Source: U.S. Department of Justice, "Annual Report of the Attorney General of the United States;" U.S. Administrative Office of the United States Courts, "Annual Report of the Director," unpublished data for 1974 were obtained from the Department of Justice and the Administrative Office of the U.S. District Courts.

TABLE 4.—ANNUAL BUDGET FOR THE ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE, 1965–74

Fiscal year	Budget	Total number of criminal and civil cases	Average amount per case
	(1)	(2)	(3)
1965	$7,072,000	43	$164,465
1966	7,175,000	44	163,068
1967	7,495,000	53	141,415
1968	7,820,000	50	156,400
1969	8,352,000	53	157,585
1970	9,761,000	59	165,441
1971	11,079,000	64	173,109
1972	12,060,000	87	138,621
1973	12,836,000	62	207,032
1974	13,019,000	67	194,313
Total 10 yr	96,669,000	582	166,098

Source: Antitrust Division, Department of Justice.

TABLE 5.—DEPARTMENT OF JUSTICE ANTITRUST CASES FILED, 1973–74

Case	Date filed (1)	Allegation (2)	Amount of commerce involved (3)	Status (4)
United States v. First National Bank of Platteville, et al.	Jan. 12, 1973	Bank merger in Platteville, Wis	$27,000,000 in deposits	Dismissed when merger agreement was terminated.
United States v. AAV Companies, et al	Jan. 16, 1973	Criminal and companion civil cases charging cigarette vending machine operators with price fixing in Cincinnati, Ohio.	$4,500,000 of a $5,000,000 market	Nolo contendere pleas and fines.
United States v. Crane Co	Jan. 23, 1973	Reciprocal purchasing arrangements with customers and suppliers.	1970 total sales were $680,000,000	Consent judgment entered.
United States v. Jahncke Service, Inc., et al	Jan. 26, 1973	Criminal charge of fixing price of ready mix concrete in the New Orleans, La., area.	$7,500,000 or 60 percent of area market	Nolo contendere pleas and fines.
United States v. National Association of Securities Dealers, Inc., et al.	Feb. 21, 1973	Conspiracy to prevent development of "secondary" market in mutuals.	1971 sales of mutual fund sales were above $5,100,000,000.	Court ruled system immune from antitrust attack.
United States v. Ed. Phillips & Sons Co	Feb. 22, 1973	Conspiracy with its retailers to fix prices of liquor in Nebraska.	30 percent of wholesale distilled spirits in Nebraska.	Consent decree entered.
United States v. Swift Instruments, Inc., et al	Feb. 26, 1973	Criminal and civil action charging 2 manufacturers of microscopes of separately conspiring with their dealers to fix prices.	$5,000,000	Nolo contendere pleas and fines, consent decree entered.
United States v. Dairymen, Inc	Mar. 29, 1973	Monopoly in sale of milk in southeastern United States.	9,500 dairy farmer members	Pending.
United States v. National Broiler Marketing Association.	Apr. 16, 1973	Conspiracy to fix U.S. prices of chickens	$600,000,000 in 1971 or 50 percent of market.	Do.
United States v. Guardian Industries Corp	do	Acquisition of competing installer of auto glass in Cleveland, Ohio market.	Guardian makes 9.5 percent of auto glass sales, acquired firm makes 32 percent.	Do.
United States v. Ampress Brick Co, Inc. et al	Apr. 19, 1973	Criminal and companion civil charges of fixing prices of concrete block in the greater Chicago, Ill., area.	$12,000,000 in 1970 in greater Chicago area	Mostly nolo contendere pleas and fines, consent decree entered.
United States v. Halliburton Co	Apr. 24, 1973	Acquisition of competing designer and constructor of electrical power generating facilities.	Acquired firm (EBASCO) consulted on 14.5 percent of fossil fuel capacity installed in United States between 1968 and 1972, acquiring subsidiary consulted on 5.7 percent	Pending.
United States v. Blue Bell, Inc., et al	Apr. 25, 1973	Acquisition of 4th largest manufacturer of industrial rental garments by 2d largest.	$37,000,000 of $113,000,000 market	Do.
United States v. Chicago Board Options Exchange, Inc.	Apr. 26, 1973	Fixing commission rates and brokerage fees charged by brokers trading securities options.	$25 to $65 commission on each trading unit order.	Do.
United States v. American Technical Industries, Inc	May 7, 1973	Acquisition of 7th largest producer of artificial Christmas trees by 1st largest.	$13,600,000 or 34.2 percent of market	Do.
United States v. Norris Industries, Inc	May 9, 1973	Acquisition of leading producer of compressed gas cylinders by another.	25.8 to 97.9 percent of relevant submarkets	Do.
United States v. Metro MLS, Inc	May 21, 1973	Conspiracy to fix commission fees on real estate transactions in Tidewater Area of Virginia.	50 members of Metro MLS—all their exclusive listings.	Consent judgments entered.

United States v. Jackson Hole Service Station Association, et al.	do	Criminal and companion civil charges of fixing prices of gasoline and automotive services in Jackson, Wyo., area.	$2,000,000 in Jackson area	Verdict of not guilty; complaints dismissed.
United States v. Finis P. Ernest, Inc., et al	May 24, 1973	Criminal charge of rigging bids on urban renewal construction project in East St. Louis, Mo.	Not available	Verdict of guilty.
United States v. Hercules, Inc., et al	May 31, 1973	Joint venture in manufacture of polypropylene.	Hercules is leading manufacturer of polypropylene in United States; Mitsui is a leading producer in Japan.	Consent decree entered.
United States v. Texaco, Inc., et al	June 12, 1973	Agreeing to restrict sale of gasoline to independent marketers.	Refined products increasing to 106,000 bbls. per day by 1976 and option for Texaco to purchase refinery owned by Coastal States Producing Co., which produces 135,000 bbls. per day.	Do.
United States v. The Real Estate Board of New York, Inc., et al.	June 19, 1973	Fixing commission rates on sales and management of cooperative apartments in New York County.	Cooperative units with total asking price of approximately $67,000,000.	Do.
United States v. Industrial Electronic Engineers, Inc	June 27, 1973	Monopolizing manufacture and sale of miniature instruments used to monitor electronic equipment.	1972 sales of defendant were $5,600,000	Pending.
United States v. Morgan Drive Away, Inc., et al	Aug. 2, 1973	Criminal charge of monopolizing business of transporting mobile homes.	3 leading transporters have 85 percent of market and $71,000,000 in 1971 revenues.	Nolo contendere pleas and fines; civil suit filed Dec. 5, 1974, pending.
United States v. United Parcel Service of America, Inc., et al.	Aug. 3, 1973	Criminal and companion civil charges of allocating customers for delivery of packages in the Phildelphia, Pennsylvania area.	Not available	Nolo contendere plea and fine, consent decreee entered.
United States v. Georgia Automatic Merchandising Council, Inc., et al.	Aug. 8, 1973	Criminal and companion civil charges of fixing prices of beverages sold in cups through vending machines in Atlanta area.	1971 beverage sales by defendants were $5,100,000 in Atlanta area.	Do.
United States v. Goodyear Tire and Rubber Co.; United States v. Firestone Tire & Rubber Co.	Aug. 9, 1973	Monopolizing the replacement tire market including anticompetitive acts and acquisitions.	Goodyear has 28 percent and Firestone has 25 percent of $2,000,000,000 market.	Pending.
United States v. Armco Steel Corp., et al	Aug. 30, 1973	Criminal charge of fixing prices and monopolizing the sale of reinforcing steel bars in Texas.	1971 sales of rebars by defendants were above $40,000,000.	Nolo contendere pleas and fines, some cases pending; companion civil suit filed Oct. 15, 1973, pending.
United States v. Aviation Specialties Co., Inc., et al	Sept. 26, 1973	Criminal and companion civil charges of fixing prices of federal crop-dusting contracts.	Portion of $26,000,000 spent on program to control "fire-ant."	Nolo contendere pleas and fines, consent decree entered.
United States v. Black and Decker Manufacturing Co., et al.	Sept. 28, 1973	Acquisition of largest manufacturer of gasoline-powered chain saws by largest manufacturer of portable electric power tools.	1972 total sales of gasoline-powered chain saws were $115,000,000.	Hold-separate order entered.
United States v. American Metal Products Corp., et al.	Oct. 4, 1973	Criminal charge of fixing prices of gas ventilation pipe.	Defendants' sales in 1970 were about $12,000,000.	Nolo contendere pleas and fines.
United States v. Roofing, Metal & Heating Associates, Inc.	Oct. 11, 1973	Conspiring to limit the length of guarantees for replacement roofs in the Philadelphia, Pa., area.	Member firms' revenues in 1972 were above $7,500,000.	Consent decree entered.
United States v. Allan Molasky, et al	do	Criminal charges of attempting to monopolize wholesale distribution of magazines and paperback books in the Gulf Coast area.	Not available	Nolo contendere pleas and fines, suspended sentence.

TABLE 5.—DEPARTMENT OF JUSTICE ANTITRUST CASES FILED, 1973-74—Continued

Case	Date filed (1)	Allegation (2)	Amount of commerce involved (3)	Status (4)
United States v. Interstate Gopher News, Inc., et al.	Oct. 15, 1973	Criminal charge of restraining wholesale trade of paperback books and magazines in Houston, Galveston and San Antonio, Tex.	1972 sales by wholesalers in area were above $6,000,000.	Nolo contendere pleas and fines.
United States v. Combustion Engineering, Inc., et al.	Nov. 2, 1973	Criminal and companion civil charges of fixing prices of chromite sand.	Accounted in 1971 for above 90 percent of $2,500,000 market.	Do.
United States v. Michigan National Corp., et al.	Nov. 14, 1973	Acquisition of 4 banks in Michigan	Michigan National had 17.7 to 39.4 percent of various local market bank deposits.	Dismissed without prejudice, refiled June 13, 1974, pending.
United States v. The Merchants National Bank of Burlington, et al.	Nov. 29, 1973	Bank merger in Montpelier and Burlington, Vermont market.	2nd and 5th largest shares of commercial bank deposits in Montpelier-Barre area.	Complaint dismissed.
United States v. Patrick M. King	Dec. 18, 1973	Criminal charge of giving perjured testimony in trial of fixing prices in mechanical contracting in Louisville, Ky.	Not available	Verdict of not guilty.
United States v. United States Gypsum Co., et al.	Dec. 27, 1973	Criminal and companion civil charge of fixing prices of gypsum board.	Defendants sold $4,000,000,000 of gypsum board during period of conspiracy, currently have above 90 percent of market.	Nolo contendere pleas and fines, suspended sentences.
United States v. Mid-America Dairymen, Inc., et al.	do	Monopolizing sale of milk in central United States, includes 10 States.	19,000 milk producers are members	Pending.
United States v. Amateur Softball Association of America.	Dec. 28, 1973	Conspiracy to restrain trade in sale of top-grade softballs.	1971 industry sales were above $6,000,000	Consent decree entered.
United States v. Goodpasture, Inc.	do	Restraining competition among stevedoring companies in the Houston, Tex., area.	Defendant owns grain elevator in Houston area.	Pending.
United States v. Huckaba & Sons Construction Co., et al.	Jan. 17, 1974	Criminal actions against rigging bids on federally assisted highway projects in Illinois.	Sum of low bids on 11 involved projects was above $20,000,000.	Mostly guilty pleas and fines, some verdicts of not guilty, some pending.
United States v. Rainbo Baking Co. of Tucson, et al.	Feb. 14, 1974	Criminal and companion civil charges of fixing prices of bakery products in Arizona.	Defendants' sales were about $31,000,000 in 1972.	Nolo contendere pleas, fines and sentences.
United States v. Mrs. Smith's Pie Co.	Feb. 21 1974	Acquisition of 4 related companies	Mrs. Smith's 1972 sales were $53,500,000 or 33 percent of frozen dessert pies, acquired company's sales were $12,200,000.	Pending.
United States v. Certain-teed Products Corp., et al.	Feb. 27, 1974	Acquisition of competing manufacturer of fiberglass insulation, leaving only 3 producers in industry.	Certain-teed had 17.8 percent and acquired firm had 11.5 percent of 1972 industry sales of $151,700,000.	Do.
United States v. H. S. Crocker Co., Inc., et al.	Mar. 12, 1974	Criminal and companion civil charges of fixing prices of paper labels.	Sales of 9 producers	Nolo contendere pleas and fines, suspended sentences, special probations requiring speeches condemning price-fixing before civic groups.
United States v. American Cyanamid Co.	Mar. 19, 1974	Criminal charge of violating a 1964 consent decree limiting production of melamine pursuant to monopoly charge.	Cyanamid limited until 1974 to 30,000,000 pounds production of over 70,000,000 pounds capacity until rest of industry increases capacity.	Pending.

United States v. Climatrol Corp., et al	Mar. 21, 1974	Criminal and companion civil charges of allocating building material customers in 3 county area in Florida.	Defendants' sales of screen enclosures in area in 1972 were about $3,000,000.	Pending.
United States v. Greater Los Angeles Solid Wastes Management Association, et al.	Mar. 27, 1974	Rigging bids for trashhauling in the Los Angeles, Calif., area.	Annual revenues of defendants about $30,000,000.	Consent decree entered.
United States v. Copper Development Association, Inc., et al.	Apr. 17, 1974	Restricting licensing of a patent on a special plumbing system.	Plumbing systems in highrise office and residential buildings.	Pending.
United States v. Albertson's, Inc., et al	Apr. 19, 1974	Acquisition of wholesale grocery firm by retail grocery firm in Idaho.	Wholesaler had 43 percent or $53,000,000 of sales in 1972 in southern Idaho-eastern Oregon market.	Do.
United States v. Armco Steel Corp., et al	Apr. 23, 1974	Criminal charge of allocating customers of reinforcing steel bars in Louisiana.	Defendants' sales of rebars in 1972 were about $6,000,000 in area.	Nolo contendere pleas, fines and sentences.
United States v. Martin Linen Supply Co., et al	May 3, 1974	Criminal and civil charges of violating 1969 consent judgment on conduct of linen rental supply business.	2 Texas companies in linen rental supply business.	Verdict of not guilty, appealed by Government.
United States v. Oregon State Bar	May 9, 1974	Maintaining fee schedules	All attorneys in Oregon with annual revenues of about $150,000,000.	Pending.
United States v. American Building Maintenance Corp., et al.	May 16, 1974	Criminal and companion civil charges of rigging bids on building maintenance work in New Jersey.	Defendants' revenues in 1972 were about $25,000,000.	Nolo contendere and guilty pleas and fines, suspended sentences.
United States v Beatrice Foods Co., et al	June 19, 1974	Criminal and companion civil charges of fixing prices of wood toilet seats from 1965 to 1974.	Defendants' sales during conspiracy were about $100,000,000 or above 75 percent of industry sales.	Nolo contendere pleas and fines, some pending.
United States v. Continental Can Co., Inc	June 27, 1974	Reciprocal purchasing arrangements with customers and suppliers since 1949.	Defendants' sales in 1972 were about $2,200,000,000.	Consent decree entered.
United States v. Grow Chemical Corp	do	Reciprocal purchasing arrangements with customers and suppliers since 1968.	1971 sales of $60,000,000 of paint and coatings.	Do.
United States v. Leggett & Platt, Inc	June 28, 1974	Acquisition of metal bed frame manufacturer in North Carolina by another in Missouri.	Acquirer had 5 percent, acquired had 6.7 percent of 1971 market of $28,300,000 east of Rockies.	Complaint dismissed, appealed by Government.
United States v. Foote Mineral Co., et al	do	Allocating lithium sales in world markets	Foote controls 45 percent of U.S. lithium production.	Pending.
United States v. Ambrose Printing Co., Inc., et al	July 17, 1974	Criminal charge of rigging bids on printing services and office supplies for sales to the State of Tennessee.	Defendants' sales to state from 1968 to 1971 were about $1,400,000.	Nolo contendere pleas and fines.
United States v. E. I. duPont de Nemours and Co., et al.	July 18, 1974	Criminal and companion civil charges of fixing prices of dyes.	Defendants' dye sales were $300,000,000 of $480,000,000 market in 1971.	Nolo contendere.
United States v. Bethlehem Steel Corp., et al	Aug. 5, 1974	Criminal and companion civil charges of rigging bids on rebars in Florida since 1960.	Defendants' rebar sales in 1972–73 were above $85,000,000.	Nolo contendere pleas and fines, pending.
United States v. Borden, Inc., et al	Aug. 16, 1974	Criminal and companion civil charges of fixing prices of dairy products in Arizona.	4 defendants' sales in 1973 were about $80,000,000 or about 90 percent of Arizona market.	Nolo contendere pleas by most individuals, pending.
United States v. Hughes Tool Co., et al	Aug. 30, 1974	Acquisition of leading manufacturer of oil field handling tools.	Acquired firm had sales of $4,900,000, about 40 percent of 1973 market.	Pending.
United States v. Champion International Corp., et al	Sept. 6, 1974	Criminal and companion civil charges of rigging bids on purchases of public timber in Oregon.	Defendants' sales of timber products were about $40,000,000 in northern central Oregon.	Do.
United States v. Slide-Rite Mfg. Corp., et al	Sept. 10, 1974	Criminal and companion civil charges of fixing prices of zipper sliders.	Defendants, all principal manufacturers, had annual sales total of about $6,000,000.	Nolo contendere pleas and fines, suspended sentence.

TABLE 5.—DEPARTMENT OF JUSTICE ANTITRUST CASES FILED, 1973-74—Continued

Case	Date filed (1)	Allegation (2)	Amount of commerce involved (3)	Status (4)
United States v. Clovis Retail Liquor Dealers Trade Association, et al.	Sept. 27, 1974	Criminal and companion civil charges of fixing prices of alcoholic beverages in Clovis, N. Mex.	Clovis retailers' sales were above $3,000,000 in 1972.	Nolo contendere pleas, 1 verdict of guilty.
United States v. Saks & Co., et al	Oct. 7, 1974	Criminal and companion civil charges of fixing prices of women's fashions in the New York City area.	Defendants' sales of women's clothing in the area were $70,000,000 in 1972.	Nolo contendere pleas and fines, 1 pending.
United States v. Real Estate Board of Rochester, N.Y., Inc.	Nov. 19, 1974	Fixing fees for sale, lease and management of real estate.	Real estate sales of $174,000,000 were made by the Board in 1972.	Consent degree entered, appealed by defendant.
United States v. National Board of Fur Farm Organizations, Inc., et al.	do	Criminal and companion civil charges of fixing prices of mink pelts.	All domestic mink ranchers had sales of $60,000,000 in 1973.	Pending.
United States v. American Telephone & Telegraph Co., et al.	Nov. 20, 1974	Monopolizing telephone service and equipment.	Western Electric had sales in 1973 of above $7,000,000,000, A.T. & T. subsidiaries supply above 80 percent of domestic telephones.	Do.
United States Customs Brokers & Forwarders Association of Miami, Inc.	Nov. 21, 1974	Criminal and companion civil charges of fixing prices of freight forwarding and brokerage services.	Members received $4,000,000 in 1970 for preparation of export and import documents.	Nolo contendere plea and fines; complaint dismissed.
United States v. Addison-Wesley Publishing Co., et al	Nov. 24, 1974	Dividing world markets for the sale of books.	Annual U.S. book sales are above $2,000,000,000, imports $140,000,000, exports above $250,000,000.	Pending.
United States v. CBS, Inc., et al	Dec. 10, 1974	Monopolizing prime time television entertainment programing.	3 major national networks	Do.
United States v. DeBeers Industrial Diamond Division Ltd, et al.	do	Criminal and companion civil charges of fixing prices of diamond abrasive.	Worldwide grit sales of defendants were $61,000,000.	Nolo Contendere pleas and fines, 1 pending.
United States v. California and Hawaiian Sugar Co., et al.	Dec. 19, 1974	Criminal and civil charges of fixing prices of refined sugar in 3 regional markets.	In 1972, 69 percent of $268,000,000 market, 53 percent of $770,000,000 market, $50,000,000 or 86 percent of a 3d market.	Pending.

Source: "Trade Regulation Reporter" (Washington, D.C.: Commerce Clearing House, Inc., 1973 and 1974) Antitrust Division, Department of Justice.

TABLE 6.—MAJOR PRIVATE ANTITRUST SUITS IN WHICH DAMAGES HAVE BEEN COLLECTED OR AWARDED

Case	Damages collected or awarded (1)	Previous Government case (2)
Aloha Airlines, Inc. v. Hawaiian Airlines, Inc	$4,500,000.00	No.
Irvin Bray, et al., v. Safeway Stores, Inc., The Great Atlantic & Pacific Tea Co., Inc., The Kroger Co	32,700,000.00	No.
In Re Cast Iron Pipe Antitrust Cases	10,083,442.12	No.
City of Detroit, et al., v. Grinnell Corp., et al	10,000,000.00	Yes.
In Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions	[1] 195,000,000.00	Yes.[2]
Abraham Grunin v. International House of Pancakes	[3] 12,500,000.00	No.
In Re Gypsum Cases	75,000,000.00	No.
Jack Labbee, et al., v. Wm. Wrigley, Jr., Co., et al	13,580,000.00	No.
James v. Phoenix Real Estate Board, Inc	[4 5] 10,000,000.00	No.
Mount Hood Stages, Inc., d/b/a Pacific Trailways v. The Greyhound Corp. and Greyhound Lines, Inc	14,396,090.00	No.
Ohio-Sealy Mattress Manufacturing Co. of Cleveland v. Sealy, Inc., of Chicago	20,400,000.00	Yes.[6]
State of Oklahoma, ex rel. Charles Nesbitt, Attorney General, v. Allied Materials Corp., et al	4,906,864.31	No.
Telex Corp. v. International Business Machines Corp	[7] 21,900,000.00	No.
Treadway Companies v. Brunswick Corp	2,395,440.00	No.
In Re Western Liquid Asphalt Cases	24,484,000.00	No.
Zenith Radio Corp. v. Hazeltine Research, Inc	[8] 19,000,000.00	No.

[1] Over.
[2] Government case is pending.
[3] Value of revisions in franchise and equipment lease agreements.
[4] Up to.
[5] Deferred credits made available to plaintiffs who resell their homes before 1982.
[6] United States v. Sealy, Inc., was not used as prima facie evidence by the plaintiff.
[7] Damages awarded to IBM; originally $260,000,000 in damages was awarded to Telex.
[8] Nearly.

Source: "Trade Regulation Reporter" (Washington, D.C.: Commerce Clearing House, Inc.). "Antitrust and Trade Regulation Report" (Washington, D.C.: Bureau of National Affairs). "In Re Cast Iron Pipe Antitrust Cases," Notice of Final Settlement, Nov. 15, 1974. The Wall Street Journal, Oct. 18, 1973. Seattle Times, May 16, 1975.

Antitrust Cases in Which Mr. Max Has Been, or Is, Involved

Mr. Max has been or is involved as a consultant in, among others, the following antitrust cases:

1. *U.S.* v. *The Watchmakers of Switzerland Information Center, Inc.*
2. *Herman Schwabe, Inc.* v. *United Shoe Machinery Corporation.*
3. *International Shoe Machine Corporation* v. *United Shoe Machinery Corporation.*
4. *Haverhill Gazette Co.* v. *The Union Leader Corporation.*
5. *In the Matter of Columbia Broadcasting System, Inc., et al.*
6. *State of Oklahoma, ex rel. Charles E. Nesbitt, Attorney General* v. *Allied Materials Corp., et al.*
7. *Standard Industries, et al.* v. *The Skelly Oil Co., et al.*
8. *Harold E. Kohn, Trustee, et al.* v. *American Metal Climax, Inc., et al.*
9. *The Cast Iron Pipe Antitrust Cases.*
10. *Carlson Companies, Inc. et al.* v. *The Sperry and Hutchinson Company.*
11. *State of Illinois, et al.* v. *Harper & Row Publishers, Inc., et al.*
12. *State of Oregon* v. *Standard Oil Company of California, et al.*
13. *State of Washington, et al.* v. *Chevron Asphalt Co., et al.*
14. *State of California* v. *Standard Oil Co. of California, et al.*
15. *The State of Alaska* v. *Chevron Asphalt Co. of California, et al.*
16. *State of Arizona, etc.* v. *American Petrofina, Inc., et al.*
17. *Board of County Commissioners of the County of Custer and J. D. Metcalfe, Inc., an Oklahoma Corporation, for themselves and for all others similarly situated* v. *Wilshire Oil Company of Texas, et al.*
18. *U.S.* v. *Broadcast Music, Inc.*
19. *Arkansas State Highway Commission and the State of Arkansas* v. *Arkansas Bitumuls Co., et al.*
20. *State of Washington* v. *Wilson Sporting Goods Co., et al.*
21. *U.S. Pipe* v. *"Automatic" Sprinkler Corporation.*
22. *Ireco Chemicals, et al.* v. *Hercules Powder Company, Inc.*
23. *Essex Universal Corporation* v. *Herbert J. Yates.*

24. *Washington Gas Light Company* v. *Virginia Electric and Power Company.*
25. *Case-Swayne Co., Inc.* v. *Sunkist Growers, Inc.*
26. *Dri-Mix Products Company, Inc.* v. *General Foods Corporation.*
27. *F.T.C.* v. *Georgia-Pacific Corporation* (*Docket No. 8843*).
28. *Record Club of America, Inc.* v. *Columbia Broadcasting System, Inc. et al.*
29. *Record Club of America, Inc.* v. *Capital Records, Inc., et al.*
30. *The Fullerton Publishing Co.* v. *Freedom Newspapers, Inc.*
31. *U.S.* v. *Combustion Engineering, Inc.*
32. *Purex Corp., Ltd.* v. *The Procter & Gamble Co.*
33. *Denny Concrete Company, Inc.* v. *Missouri Portland Cement Company, et al.*
34. *Murray B. Marsh Company and Giffen Industries, Inc.* v. *Mohasco Industries, Inc.*
35. *Kent Frizzell, ex rel.* v. *American Petrofina Company of Texas, et al.*
36. *Sedgwick County, Kansas, et al.* v. *American Petrofina Company of Texas, et al.*
37. *Vern Miller, Attorney General of the State of Kansas, for and on behalf of The Board of County Commissioners of the Counties of Allen, Anderson, et al.* v. *American Oil Company, et al.*
38. *Jack Labbce, et al.* v. *Wm. Wrigley, Jr. Company, et al.*
39. *Plekowski* v. *Ralston Purina Co.*
40. *Sam Battle, et al.* v. *Ralston Purina Co.; Jerry C. Landes, et al.* v. *Ralston Purina Co.; Patrick E. Nolan, et al.* v. *Ralston Purina Co.*
41. *City of San Diego* v. *Union Oil Company of California, et al.*
42. *Maricopa County* v. *American Petrofina Inc., et al.*
43. *City and County of San Francisco* v. *Union Oil Company of California, et al.*
44. *Sonoma County, California* v. *Standard Oil Company of California, et al.*
45. *Klamath County, Oregon* v. *Standard Oil Company of California, et al.*
46. *The Reynolds and Reynolds Company* v. *Volkswagen of America, Inc. and Volkswagen North Central Distributor, Inc.*
47. *U.S.* v. *Amsted Industries Incorporated and Glamorgan Pipe & Foundry Company.*
48. *Berkey Photo, Inc.* v. *Eastman Kodak Company.*
49. *U.S.* v. *The Black and Decker Manufacturing Company and McCulloch Corporation.*
50. *Cranberry Products, Inc.* v. *Ocean Spray Cranberries, Inc.*
51. *Arvin Industries, Inc.* v. *Maremont Corporation.*
52. *Ocean Labs, Inc.* v. *Kelco Co. and Merck & Co.*
53. *Pettibone Corporation* v. *Caterpillar Tractor Co.*
54. *Wheat Farmers Antitrust Actions.*
55. *McCook* v. *Standard Oil Company of California, et al.*
56. *U.S.* v. *Bristol-Myers, et al.*
57. *U.S.* v. *National Broiler Marketing Association.*
58. *Palmer Data Coproration d/b/a Computerminal* v. *Burroughs Corporation.*
59. *Kenneth Rapp* v. *Dunlop Tire and Rubber Corporation.*
60. *Fuchs Sugars and Syrups, Inc. and Francis J. Prael, d/b/a Lewis and Company* v. *Amstar Corporation.*
61. *Consolidated Edison Company of New York, Inc.* v. *Standard Oil Company of California, et al.* and *Long Island Lighting Company* v. *Standard Oil Company of California, et al.*
62. *Marshall Industries* v. *International Business Machines Corporation.*
63. *New Jersey* v. *Abbott Laboratories, et al.*
64. *Distributing Corporation, et al.* v. *Utah-Idaho Sugar Company, et al.*
65. *International Rectifier Corp. et al.* v. *American Cyanamid Co., et al.*
66. *In the Matter of Retail Credit Company.*
67. *Tennessee Forging Steel Service, Inc.* v. *Nucor Corporation.*
68. *Record Club of America, Inc.* v. *Capital Records, Inc., et al.*
69. *Leslie F. English, et al.* v. *United Brands Company, et al.*
70. *Sargent-Welch Scientific Co.* v. *Ventron Corp.*

Senator ABOUREZK. The next witness is Mark Silbergeld of Consumers Union.

I would like to welcome you, Mr. Silbergeld, to the subcommittee hearings, and if you are ready to offer your testimony, we are ready to hear it.

Mr. SILBERGELD. Thank you, Senator Abourezk. I will summarize as briefly as I can, because I know that the subcommittee is behind

schedule, and submit my prepared statement[1] along with the attached comments contained in a letter[2] to Congressman Rodino regarding the House's paren patriae bill, which is similar to title IV of the legislation under consideration presently, and which my prepared statement indicates is an attachment thereto.

I will skip the preliminaries including our views about the importance of the antitrust laws, which we state are extremely important because of the role we assume they play in our economy.

STATEMENT OF MARK SILBERGELD, ATTORNEY, ON BEHALF OF CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA, AND NATIONAL CONSUMER CONGRESS

Mr. SILBERGELD. First, we agree that the FTC and the Antitrust Division need improved discovery powers. However, neither do we agree with the requested secrecy that Dr. Kauper suggests should be afforded to the fruits of those powers, nor do we believe that S. 1284 goes far enough, although it makes a laudable beginning in making the fruits of those discovery powers available to private plaintiffs.

First, we strongly disagree with Dr. Kauper's recommendation, in his testimony a couple of weeks ago, that the discovery products of CID's—Civil Investigation Demands by the Antitrust Division—should be kept secret.

Even further than the provisions of S. 1284—which authorizes the introduction of those discovery products into evidence as introduced by authorized attorneys of the Antitrust Division in other proceedings under judicial control or other administrative proceedings—we believe that they should be made available to the public once the law enforcement purpose of the Department is terminated under the provisions of Freedom of Information Act.

I would, here, lump together the CID products with the criminal investigation subject to one exception regarding the criminal investigation files. And at the same time, I would like to discuss the evidentiary value of nolo pleas. I agree that the criminal antitrust prosecution files could arguably be made available—upon demand of plaintiffs or bona fide potential plaintiffs—under some kind of protective order similar to protective orders which courts can grant in discovery proceedings.

But the real question with regard both to the investigative files of the Division and with regard to the evidentiary value of nolo pleas is, are we going to require the kind of expensive duplicative discovery on the part of private antitrust plaintiffs which, (1), Even if they decide to bring the suit, it makes it tremendously expensive to do so; (2), Increases the burden of courts and extends the period required for private and subsequent private antitrust suit; and (3), I suspect, despite Mr. Max's testimony before, in a substantial number of cases, does in fact discourage suits.

The fact that there have been an increased number of suits by private antitrust plaintiffs and indeed perhaps an increased number of successful ones over the last decade, does not indicate to me that

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[1] See p. 397.
[2] See p. 702.

there are not a substantial number of potential private plaintiffs out there who simply cannot afford to bring suit.

I know that at one point the lawyers in our office talked with private antitrust lawyers about bringing a suit related to certain agreements regarding Alaskan Slope oil production and transportation. We cannot even begin to think about bringing that suit.

We might well begin to think about it if we could bring a suit, based upon something the Justice Department might do, but which they have not yet done. But we could not begin to do it if the Justice Department brought the suit, and we then had to go through all of the discovery again. If we had the files, it might be a different story.

So I do not buy the story that because private plaintiffs have been more successful in the last decade, that there are not substantial numbers of potential private plaintiffs who are being discouraged by the tremendous cost of duplicative discovery.

And as Mr. Max did point out, there are a substantial number of cases, he believes, in which Government action in the antitrust area is not followed by a subsequent private suit.

It really makes that much difference if nolo pleas are given prima facie evidentiary value if you begin to make those Justice Department files—once the Justice Department's law enforcement purpose has terminated—available to potential private plaintiffs in some way.

And I might add that the *Agnew* case is not bad precedent for the proposition that a defendant should not be permitted to avoid the spreading of the Government's case on the record by pleading nolo. It is one step from having the Government's outline of its case made available to having the Government's evidence made available to subsequent plaintiffs, but it is not a very large step compared with that first step of the Justice Department and the court refusing to accept a nolo plea if the defendant will not agree to the making available at least an outline of the Government's case.

We would say, in any event, even if the subcommittee, after deliberating on all of the various views regarding the availability of the files and the evidentiary value of the testimony, does not agree with our position, at the very least a list of the documents and the testimony obtained on discovery should be available to potential private plaintiffs, so that they do not have to spend all of the time that is usually spent in the courts arguing with the defendants before a judge, about whether subpenas are too broadly drafted and whether plaintiffs are going on fishing expeditions, when, in fact, if they do not know what the Government has already developed, they may well have to go on a fishing expedition to narrow down the subpenas and discovery demands until they are sufficiently specific

I would say, in addition, in the title III provisions, which give the FTC increased penalties and creates increased evidentiary burdens on parties who would enjoin the FTC from using its subpena and order to file reports powers; there needs to be an addition to title III, as evidenced by the current multiplicity of litigation over the FTC's line of business, orders to file annual reports, which, while they are not actually antitrust enforcement, are closer related to their antitrust mission.

At present, the Commission has been sued in South Carolina, Pittsburgh, New York, and Delaware, over precisely the same orders

by various companies. And not only that, but all of the companies in those cases are very large corporations. Many of them have Washington offices and many others have Washington counsel or have retained Washington counsel for these particular purposes, yet none of the cases are filed in the District of Columbia court, for whatever reasons I will not conjecture.

So we recommend that the bill include an additional section, which would state a preference, not prohibit the filing elsewhere, but state a preference for removal to the District Court for the District of Columbia as the first preferred forum—and we are talking only about cases in which, not the FTC seeks to enforce orders, but in which the company goes to court and becomes, itself, the plaintiff to enjoin the enforcement of those orders, the Commission that goes into court and seeks to enforce but where the company is the plaintiff—permitting the plaintiff to show that removal to the District of Columbia would be burdensome.

The district where plaintiff has its principal place of business would become the second preferred forum to any other forum if there were a showing that it would be burdensome because of the location of documents and witnesses and because of the cost of trying the case elsewhere.

Any third forum, of course, would have it within the court's discretion. But I do believe the Commission's antitrust mission is greatly hampered by the available multiplicity of forums for trial in the same kinds of injunction suits regarding their ability to enforce their subpenas and orders to file special reports.

The parens patriae provisions, we strongly support. I will not go into the details of those but refer simply to our attached letter to Chairman Rodino.[1]

We also recommend an additional provision to S. 1284, which we believe will increase the private enforcement abilities of private plaintiffs.

As you know, Senator Abourezk, on May—I believe it was the 12th—the Supreme Court handed down their decision in the *Alaska Pipeline Service* case, holding that private plaintiffs are not entitled to awards of attorneys fees unless the statute under which the case is brought specifically so provides.

Section 15 of title 15, United States Code, does provide for attorneys fees in antitrust damage cases. It does not provide for the award of attorneys fees in antitrust injunction cases where the private plaintiff simply seeks to enjoin the antitrust violation without seeking damage.

We believe that section 15 of title 15, United States Code, should be amended to authorize the award of attorneys fees in injunction suits where damages are not sought under the antitrust acts as well.

The merger notices provision, we think, are absolutely essential. The present method by which the Antitrust Division and FTC learn of mergers—large mergers—the kinds of large mergers that are described in this title V, is that they read the Wall Street Journal and they read the various trade regulation reporters and trade newspapers and they hope to catch them in time.

We think this is a game. We do not think this is a very effective way of reaching Government determinations as to whether the Government is going to seek an injunction against a merger.

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[1] See p. 702.

We believe that the 60-day provision for notification is generally adequate but we agree with Dr. Kauper that the Government should be permitted to make a showing that an additional period of time is necessary, especially when evidence has been requested of the parties who propose to merge and that evidence is not yet available or has not been made available timely for the Government to study and make its case.

What we have is the Government going into court without having time to evaluate the effect of the merger, and having to show to the court that if the merger is permitted to take place before the Government can put forth its case, irreparable damage will result.

That is not a very realistic burden to put on the Government. We would disagree, however, with Dr. Kauper's recommendation, again, for secrecy, for total and interminable secrecy to be given to these notifications. We completely disagree; we see no reason for it.

Furthermore, we see a great deal of harm coming from it, in that there would be no way for the Congress or the public to evaluate the Government's antimerger enforcement program if we do not know what notifications they receive.

We believe they should be made public. We think you should evaluate carefully whether there is an advantage to the public's knowing, at the time the notification is received, that that notification has been filed with the Department and the Commission.

If there is such an advantage to having the public know, then we believe it should be available immediately. But, in any event, we believe it should be made available and placed on a public log, together with the agencies, that is the Antitrust Division or the FTC determination to oppose or not oppose the merger.

At the time either that the agency goes to court and determines to take action or at the time that the 60 days expires, the Government having taken no action, I believe it is absolutely essential to evaluation of any antimerger program that the public and the Congress be able to know what notifications have been received.

With regard to the Bayh amendment, the first provision, on adding predatory practices as intent to exclude from business or from any line of business to the Sherman Act—we do not disagree in principle, but we are unable to tell what exactly the present wording of that provision covers.

And we are not sure whether it can be redrafted so that a prudent businessman, seeking advice from antitrust counsel, might not be wise to not engage in practices which may be nothing more than good hard competition. We are a little concerned about whether that language can be provided in such a way that you do not discourage procompetitive activities as well.

We strongly agree, however, with Senator Bayh's proposal with regard to proportional penalties, but we would recommend that you amend that provision by permitting the Justice Department, if they can so prove, to prove that the actual damages from the violation exceeded the 20 percent proportional penalty which the Bayh amendment otherwise would authorize.

Further, we would recommend that proportional penalty provision apply to sections 3 and 8 of the Sherman Act, as well. Section 3 has to do with violations in the territories in the District of Columbia and section 8 has to do with certain kinds of violations in the import trade.

In summary, Senator Abourezk, we strongly support the provisions of S. 1284 and we believe that with these changes and additions, you will be prepared to recommend to the full committee and to the Senate a most important and most necessary piece of legislation.

Senator ABOUREZK. Thank you, Mr. Silbergeld. The majority counsel has some questions for you, Mr. Silbergeld.

Mr. NASH. Mr. Silbergeld, in the early years of the consumer movement, and, in fact, up to the present time, I have detected an emphasis in the consumer organizations to seek legislation to curb and regulate rather specific activities of business, which the consumers' representatives believe detrimental to the consumer.

At the outset of the movement, which began somewhere back about 10 years, I suspect, very little emphasis was placed on the role of competition and on antitrust policy in terms of protection of consumers. Recently, the Congress has noted a much greater emphasis by consumer groups on the role of competition, and antitrust policy, as consumer protection measures.

Am I correct in that assessment, and could you elaborate on what I detect to be the changing views of the consumer movement?

Mr. SILBERGELD. Yes. I think that basically you are right Mr. Nash. I recall going back, however, to a 1947 issue of Consumer Reports. We did an extensive article on whether Congress should amend the antitrust enforcement provisions to shift from the FTC to the Agriculture Department enforcement authority for certain orders the FTC had obtained against packers and stockyards.

There has not been total ignorance, consumer ignorance, of antitrust matters going even back to the 1930's. But the focus especially in the last 10 years with the great increase in consumer activity, has been on matters which are properly or improperly, described as consumer protection. In other words, a sort of laundry list of retail merchants fraud and manufacturers failure to make good on their product—warranties on their product defects. Perhaps lamentably so, but nevertheless true—and Chairman Hart himself has noted—it has taken a recession, perhaps a depression, coupled with severe inflation to call people's attention again to antitrust, and the structural and nonretail conduct, on the kind of problems that effect prices as much, or more than, fraud by your local retail merchant.

And I think that there has been, in the last 3 or 4 years, tremendous increase in the knowledge of the kinds of economic problems that are involved in antitrust on the part of consumer organizations. I think that those consumer organizations, which do lobby, such as the National Consumer Congress, and Consumer Federation of America, have taken on increased lobbying roles in such legislation as the proposed antitrust exemption for bottlers, and the independent grocery manufacturers. Five years ago very few consumer organizations would have had the expertise to debate this with a Member of Congress, or with an attorney representing the interest seeking that legislation.

I think you are right, the emphasis in consumer movement has shifted—not totally—but in very substantial part to the questions of industrial economics.

Mr. NASH. Many people had high hopes in the 1930's, and early 1940's for the accomplishments to be brought to the economy from

multiplicity of regulatory agencies created in the aftermath of the Great Depression.

Many people today do not believe that those agencies properly carried out their legislative mandate. Do you have any concern that the multiplicity of so-called "Consumer Legislation," dealing with specific activities during the 1960's and 1970's may turn out not to be implemented and carried out as envisioned when we get to the late 1970's and 1980's?

Mr. SILBERGELD. I do. And I also have some question as to whether some of them turn out to have been effective legislation even prior to their administrative implementation.

When we talk about regulation, I think we have to divide the pathway of regulatory agencies into three categories, allowing some kind of a blurring between the three categories.

On the one hand we have such areas as drug safety, certain aspects at least of automobile safety, which are traditional exercises of the constitutional authority of the State to protect the health and welfare of its citizens, and which are not pure economic regulatory decisions based upon the proposition that we either have a limited resource which requires a single distribution network or an area in which the Government can plan better than with the willy-nilly planning mechanisms at the marketplace, such as CAB. I don't think that I am so much concerned about whether the FDA is a good concept. I am somewhat concerned with their performance.

On the other hand, we do have the area of the CAB and the ICC, where the purpose is purely economic, and which I think has not only been defective in its administration, but I think it is time to examine whether the purposes originally envisioned are still purposes which we should seek to pursue today.

And in the middle we have the kinds of things like the Antitrust Division, the FTC, where the purpose is not to plan economically, but to prohibit certain kinds of practices, and prohibit or prevent certain conditions from arising where it is really not neutral because certain policies have been decided upon; but it is not Government regulation, in the sense the Government is determining who will, and who will not, participate in the marketplace, or what market they will serve in.

But it may edge over into that in certain instances, as indicated in recent exchanges between our office, the Office of Wage and Price Stability and the FTC over advisory opinion No. 147 on backhaul where you do get into the question of whether the law, as applied, may be used for regulatory purposes, which shade over into that third category.

Now, the performance of these agencies, I am especially concerned about. They have to do with quality of Presidential appointments to the agencies, the kind of criteria that the White House uses in filling these appointments.

And frankly, the performance of the Senate and its committees in passing on these judgments. For many years it has been the view of many Senators that the President is entitled to his own man—and it usually has been a man—and subject only to the provision that he is not a crook.

Never mind if he has biases which are contrary to the agency's statutory mission. Never mind if he had no experience in the area. Never mind if he has no particular intellectual qualifications which will enable him to learn what the agency is all about in a reasonably brief time, so that he can be an effective commissioner for the period of his appointment.

The Senate has simply said that the President is entitled to whoever the President wants as long as there is nothing criminal, or financially fraudulent, in the appointee's background. I think that area is going to require some very specific attention, both by consumers and the Congress, bringing pressure on the White House for better appointments, and by Senate committees in passing upon nominations, there is some evidence that the latter is happening, and I hope that it improves.

Mr. NASH. A number of witnesses have criticized the parens patriae provisions of the bill as, in effect, being an unjustified boon to the antitrust private plaintiff's bar. They argue that most of the recovery from treble damage actions has gone, and will continue to go, to lawyers, not to consumers on whose behalf the cases have been brought.

Do you have any comment you care to make with respect to whether the title IV provisions will indeed benefit consumers, rather than lawyers, as has been contended?

Mr. SILBERGELD. Well, first of all, I would say that there is even more of a boon to the antitrust defendant's bar, since there usually are a half-dozen defendant's lawyers for every plaintiff's lawyer in a treble damage action, especially if the defendant is a very large corporation.

And the more money that is involved, the more likely that is to be true, except in the rare, and recent phenomenon, which Mr. Alioto pointed out, in which large corporations are suing other large corporations under the antitrust laws.

But I really think that is beside the point. The fact that a lawyer makes a very substantial contingent fee out of a case may be an appropriate question in determining what kinds of restrictions the bar, or courts, should put on lawyers' fees if, in fact, that is an appropriate discussion.

But I do not think it is an appropriate consideration here. I am unaware that any attorney in any private treble damage action is making fees to the exclusion of the clients' recovering very substantial amounts of damages if a substantial total award is made.

It may be true in many cases that we cannot find all the plaintiffs where the practice has been widespread. It may be that the appropriate award there is, as was suggested during Mr. Max's testimony in the case of tetracycline, to a drug program, but that is really beside the point.

I am, first of all, unaware that plaintiffs are going hungry, so to speak, in the wake of a substantial award, while their lawyers are going off fat. Secondly, even if that were true, I would say that the answer is to correct that situation and not to fail to take steps to increase the opportunity for plaintiffs to bring suits.

The real purpose of these suits, the most important purpose of these suits, is their deterrent effect. And to make it impossible for plaintiffs who have been wronged, to bring suit simply because of the

legal fees arrangement that is worked out, if that is the case, and I do not think it is the case, in the division of the award between the plaintiff and the attorney, throws the baby out with the bath water. It does away with the deterrent effect of the successful plaintiff's fee. I do not think that is what we want to happen.

Mr. NASH. Thank you. I have no further questions, Mr. Chairman.

Senator ABOUREZK. Mr. Chumbris?

Mr. CHUMBRIS. Thank you, Mr. Chairman. I have just one point. I want to make sure I understood you correctly. In the very, very beginning you were talking about the civil investigative demand. Did I understand you correctly, that after the Justice Department is through with the documents, you want them to put it on the public record?

Mr. SILBERGELD. Or to make it available. And I would point out, Mr. Chumbris, that this is now done at the FTC. Now, I say subject to two things, and I say this in our prepared testimony.

No. 1, the exemptions of the Freedom of Information Act, other than the law enforcement purpose exemption, such as exemptions for trade secrets and others; plus the kinds of restrictions which are now reflected in the FTC's public disclosure regulations, which apply to the Commission's disclosure of investigative files.

This, for instance, permits the Commission, before it discloses the files, to delete the names of informants, of competitors who have complained, for instance, or of a member of the public who has complained, to prevent harassment. A very similar program is in effect at the FTC.

I have been unable to find anybody who said that it has either been a problem, or that it has caused FTC to have greater discovery problems than they used to have; and they have always been substantial.

So it is not something that we thought up at our office on Massachusetts Avenue. It is something that has been in effect in the Antitrust Division's sister agency for, I guess, about a year now.

Mr. CHUMBRIS. The only reason I have raised the question is because of the practical aspect of the legislative process. Now, I was here when the issue was first brought up in 1959; we had hearings on it. Senator Kefauver was insisting upon the documents not only going to the Justice Department, but that they should be submitted to the Antitrust Subcommittee of the U.S. Senate, and to the House Judiciary Committee. And the Senate Antitrust Subcommittee did not approve the bill with such a provision.

It balked on it on the basis that the more you spread those documents around, the more they may become public. And the whole basis of a civil investigative demand law was the fact that the Justice Department could get 90 percent of the information from the corporations voluntarily; but it was that other 10 percent that the Justice Department could not obtain without a special law.

So in order not to go to the grand jury, but to be able to get this information under this particular act, with the restrictions that were placed upon it, finally, in 1962, a bill was agreed upon. Senator Kefauver, as chairman, and Senators Dirksen, Hruska, and Ervin, of the subcommittee, who had a different view from that of the Chairman, worked out the agreement which was encompassed in the provisions of the bill that was reported by the Senate.

When it went to the House, the House had greater restrictions, Mr. Chairman. They even deleted some of the concessions that Senator Kefauver wanted in the Senate bill. Much of that is the subject of some of the amendments that are being presented now. The reason I raised the question, I wanted to make sure I understood you clearly. Congress has been very, very restrictive on this issue you are raising.

Congress may feel that the amendments to the law are too drastic, as you have suggested, and if they go even further, the chances of passing the amendments may be seriously affected. Thank you.

Mr. SILBERGELD. That was 1962, Mr. Chumbris. I do not think that, at that point, we had the experience, either in the Freedom of Information Act, or the FTC's disclosure rules, regarding their investigating files, which go even substantially beyond that because they waived the law enforcement purpose exemption to a substantial extent. So I am not sure that that history has not been overcome by subsequent experience.

I would also say, investigators tend to make the claim, which is difficult to support because they are projecting the future, that if anybody is able to get the information that we collect everybody is going to clam up and we will not be able to get it, or we will have to spend years in court getting it.

Well, first, it is very hard to evaluate. Second, even if it is true that the length of time required for discovery will be increased and there will be greater resistance and greater need for compulsory process, they tend not to evaluate the value of the eventual disclosure to a private plaintiff as a deterrent to the very action which they find is necessary to investigate and prosecute in the first place.

Mr. CHUMBRIS. We are running short on time, and I thank you very much.

Mr. SILBERGELD. Thank you, Mr. Chumbris.

Senator ABOUREZK. Thank you, Mr. Silbergeld.

Mr. SILBERGELD. Senator Abourezk, thank you.

[The prepared statement of Mr. Silbergeld follows. Testimony resumes on p. 400.]

PREPARED STATEMENT OF MARK SILBERGELD, ATTORNEY, CONSUMERS UNION WASHINGTON OFFICE ON BEHALF OF CONSUMER UNION, CONSUMER FEDERATION OF AMERICA, AND NATIONAL CONSUMER CONGRESS

Mr. Chairman and members of this distinguished subcommittee, it is my privilege to accept your invitation to testify on the Antitrust Improvements Act of 1975. I appear on behalf of Consumers Union,[1] the Consumer Federation of America,[2] and the National Consumer Congress,[3] all of which join in their strong support for this very important antitrust legislation.

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[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of *Consumer Reports* (magazine and TV) and other publications. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports*, with its over 2 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] Consumer Federation of America is the nation's largest consumer organization. It is composed of over 200 National, State and Local nonprofit organizations that have joined together to espouse the consumer viewpoint. Among our members are Consumers Union, Publisher of *Consumer Reports;* 17 Cooperatives and Credit Union Leagues; 45 state and local consumer organizations, 66 rural electric cooperatives, 27 National Organizations ranging from the National Board of the YWCA to the National Education Association, and 16 National Labor Unions.

[3] National Consumers Congress is a mass membership, grassroots consumer organization which grew out of the meat boycott of 1973.

Antitrust is the mechanism by which we seek to assure that competition will keep our product and service markets competitive, thereby assuring reasonably efficient production and distribution and a fair return—but no more than a fair return—on the producer's risk and investment, this the mechanism by which we expect to keep quality up, prices down, and enough producers in the market to meet consumer demand. And it is the mechanism by which we seek to assure that resources will be allocated according to consumers' preferences and wants. In view of all these expectations, it is unfortunate that—as the Chairman of this subcommittee recently pointed out—it has taken a serious recession, or perhaps a depression, coupled with serious inflation, to turn significant public attention to the question of how well the antitrust laws are working and how well they have been enforced.

Most consumer organizations would agree, I am sure, that antitrust laws have not worked well enough—in great part because they have not been enforced well enough—it is the purpose of these hearings, and of S. 1284, to improve the procedures which are available to the nation's two primary antitrust agencies in the investigation and prosecution of antitrust violations. The Antitrust Division and the Federal Trade Commission have endorsed most of the provisions of S. 1284, indicating that these provisions would enable them better to enforce the antitrust laws. We are pleased to offer our support for them as well.

In addition to improving federal antitrust enforcement, the proposed legislation would enable state attorneys general to bring citizens suits for damages under the antitrust laws, under provisions similar to those recently approved by the House Judiciary Committee's Subcommittee on Monopoly and Commercial Law. We believe that this power would have a very significant deterrent effect on practices which are clearly anticompetitive and would make possible such consumer redress for antitrust injuries as is now for economic reasons simply not available.

Further, the legislation has the purpose—in some respects—and has the potential—in other respects—to improve the ability of potential private plaintiffs to be able to maintain treble damage actions. We include herein certain recommendations which would further this purpose by making agency investigative files available after the law enforcement purpose has been achieved or terminated. Concomitantly, we oppose the recommendations of the Antitrust Division that certain information—including all information obtained by Civil Investigation Demand and all notifications of intent to effect large mergers—be keep secret from the public and from potential private antitrust plaintiffs.

We also support the proposed Bayh Amendment, which would create an antitrust penalty proportional to the profit realized from the violation.

Finally, we propose that the attorneys' fees award provisions of 15 U.S.C. § 15 be extended to cover suits for antitrust injunctions, as well as to private treble damage suits already covered by the attorney's fees authorization.

TITLE II

Title II contains several amendments to the Antitrust Civil Process Act, 15 U.S.C. § 1311, which are designed to improve Antitrust Division access to information relevant to its investigations. The Division agrees, in most respects, that these amendments would improve their ability to carry out their duties. We support these amendments.

However, we disagree with certain changes requested by Assistant Attorney General Kauper, and we also believe that in one respect S. 1284 does not go far enough with regard to public access to information obtained by Civil Investigation Demand (CID).

Wrapping the evidentiary fruits of CIDs in a cloak of eternal secrecy, as recommended by the Department of Justice, creates the need for unnecessary duplication of discovery by potential plaintiffs in private antitrust treble damage litigation. This duplication adds to the workload of the Federal courts. It increases the costs, including attorneys fees, of private litigation to both plaintiffs and defendants. Additionally, the increased "costs" and attorneys fees may discourage all but the most wealthy of potential private plaintiffs from bringing suit under the antitrust laws, thus lessening the potential deterrent effect of these laws and increasing the enforcement problems faced by FTC and the Antitrust Division.

For this reason, we do not agree that § 201(j) of S. 1284—which would permit Antitrust Division attorneys to introduce information obtained by CID into evidence in court, grand jury, and administrative and regulatory proceedings, as well as in other antitrust investigations—is inappropriate. Rather, we do not

believe that the provisions of S. 1284 go far enough in this respect. Once the Division has disposed of an investigation or completed litigation or a Consent Agreement—in other words, once it has terminated or fulfilled its law enforcement purpose—CID files should be available to any member of the public on request under the Freedom of Information Act, subject to those exemptions of The Act and to such additional exemptions as the Federal Trade Commission prescribes for disclosure of its files in closed matters. The FTC does have similar provisions for public access to its closed investigational files, and we are unaware of any resulting harm either to their ability to investigate antitrust violations or to business corporations.

At the very least, even if the Committee does not add such a disclosure provision to S. 1284, it should require the Division to maintain and disclose upon request—after the law enforcement purposes has been terminated or fulfilled—a list of documents and testimony obtained by CID, in order to minimize to some extent the duplicative efforts required for discovery by potential private plaintiffs. And S. 1284 should also be clarified by providing that information obtained by CID can be shared by the Department with other agencies for purposes of law enforcement or economic studies related to industry structure and practices. Whatever arguments can be made for requiring private parties to engage in needless duplicative discovery certainly do not apply to duplicative discovery by other federal agencies.

TITLE III

Title III is designed to increase the Federal Trade Commission's ability to obtain information for use in carrying out its antitrust, consumer protection and economic reporting functions. Specifically, § 301 would increase the penalty for failing to comply with orders to file annual and special reports from $100 daily to $1000-5000 daily, and would extend the application of the penalty to natural persons as well as corporations. In addition, once the FTC served upon a party notice that it is in default by reason of failing to respond to a subpoena or an order to file an annual or special report, the Commission could go to Court to enforce the penalty provisions for non-response. Then, the party subject to the subpoena or order would be required to meet the heavy burden, in order to avoid accumulation of those penalties, of showing that (a) it is likely to succeed on the merits in resisting the subpoena or order, (b) it will suffer irreparable harm if the penalties accumulate, and (c) the equities clearly favor a stay of the accumulation of penalties.

These provisions, taken together, should greatly assist in preventing situations such as the present fiasco involving the FTC's orders to 345 firms to file annual line of business (LOB) economic reports. The Commission clearly has the authority to collect and analyze the data required by the LOB reports and the information is clearly relevant to the Commission's LOB annual study. The arguments on which resistance is based—primarily undue burden—have to date been unsupported by hard evidence. Instead, various of these respondents have filed suits in various forums, some suing in the Eastern District of New York, others in the District Court in Delaware, one in South Carolina, still another in Pittsburgh producing at least four suits in four separate jurisdictions, involving basically the same issues.

Thus, in addition to the provisions of § 301, Title III should contain a provision designed to reduce the multiplicity of such suits involving the same subject matter and issues. *First,* such a provision should express a Congressional policy disfavoring such multiplicity. *Second,* the U.S. District Court for the District of Columbia should be the favored forum unless a party can show that it would work a hardship not to try the case in the District where it has its principal place of business. *Third,* the second choice of forum should be the district where the company has its principal place of business, this choice should be exercised only where the requisite hardship showing has been made, and this choice should be very strongly preferred over any third choice of forum. *Fourth,* the Courts should be authorized and required to consolidate such multiple suits according to these preferences.

Under these tests, the FTC in its Line of Business litigation would now be faced, we believe, with a single proceeding in the District Court for the District of Columbia, and the proceedings might well have been disposed of because of the discouraging effect which such a provision would have on multiplicity and forum shopping. All of the plaintiffs resisting LOB orders, we note, are very large corporations with many millions of dollars in annual revenues, many of them have Washington offices or Washington counsel, and litigating in the District of Columbia would not be particularly burdensome. We urge the Committee to consider an amendment to S.1284 along these lines.

TITLE IV

Title IV would give the attorneys general of the States the power to bring suit on behalf of the state's citizens for antitrust damages to the citizens in their private capacity and to the general economy of the state. We support these provisions. We submit for the record a copy of the comments submitted by Consumers Union on similar legislation which was considered by the House Judiciary Committee's Subcommittee on Monopoly. Unfortunately, we have not had time to analyze the "clean bill" recommended by that subcommittee. However, we believe that the comments of Consumers Union on the original House bills in the 94th Congress will be of assistance to this Committee. The potential deterrent effect of the *parens patriae* power may be as great, if not greater, than the effect of the federal procedural amendments of S. 1284 standing alone.

TITLE V

Title V would greatly increase the federal pre-merger notification programs at FTC and the Antitrust Division. The primary feature of this title would require sixty day pre-notification for potentially significant mergers—those involving acquisition by corporations with assets exceeding $100 million of assets in excess of $10 million. This would provide a meaningful change from the present system. At present, the two antitrust agencies have no systematic means of knowing when such mergers are about to occur. They now may have to race to the federal district courthouse without adequate opportunity to determine what harm to the economy, if any, may result from the merger which has just taken place or is about to take place, and must then meet the burden of showing that the potential harm which they have *not* had time to assess will be irreparable. And, at present, if the agencies cannot get into Court before the implementation of the merger, they may face a situation in which assets have been scrambled, employees replaced, or other changes implemented which are difficult if not impossible to undo.

The sixty day notice provision in § 23(b) seems adequate, but should be subject to an extension granted by the Court if the Antitrust Division or the FTC is seeking information from the merging parties which has not been or cannot be supplied on a schedule which permits reasonable agency analysis and use within the sixty day period.

We strongly oppose the confidentiality which the Antitrust Division recommended for the actual notification of intention to merge. There is no way for the public or the Congress to measure the effectiveness of the FTC's and Justice Department's merger enforcement programs unless it is known what mergers they were informed of and what action or inaction followed the notice. This seems especially important regarding the mergers which would be subject to Title V notification, since these mergers would involve very substantial assets. Therefore, instead of a policy of secrecy, what is required is the provision for disclosure of merger notification upon request, as well as a requirement that the two antitrust agencies keep and make public a record of their actions in opposing or not opposing mergers of which notice is given under Title V. Serious consideration should be given to the question of whether public knowledge of the notification at the time it is filed would be beneficial, detrimental, or of no significance to the merger program. If there is no particular reason why this information need be disclosed at the time of filing, it may be reasonable to provlde for confidentiality until the sixty day period expires or until FTC or the Department seeks an injunction, which occurs first.

TITLE VI

Title VI is designed to make a plea of *nolo contendere* by a defendant in criminal antitrust prosecutions: "prima facie evidence against such defendant in any civil action brought by any person against such defendant under [the antitrust laws], as to all matters in the indictment necessary to sustain a judgment of conviction upon a jury verdict that the defendant was guilty of the offense charged in the indictment."

This proposed change would obviate the present ability of criminal antitrust defendants to prevent the government's evidence from being used in a civil suit by pleading *nolo contendere*, rather than pleading guilty, or pleading not guilty and requiring the government to prove its case. The effect of this present practice is that, while the defendant may, as a result of the *nolo contendere* plea, become subject to a prison sentence and a fine, he can thereby avoid the potentially much greater civil liability which would be likely to occur if the government's evidence were to become available to private plaintiffs.

We agree with this provision in principle, despite the objections of the Antitrust Division that it may result in more litigated cases. First, there is an unmeasurable but highly predictable deterrent effect to be obtained from the availability to private plaintiffs of the government's evidence in contested criminal antitrust prosecutions—if such would indeed be the result—or from the evidentiary value of the plea if it would not be the result. In measuring the total impact of this provision, we must measure both the potential deterrent effect and the increased potential for private damage recovery, as well as any added burden on the Antitrust Division.

However, we would also note that the real issue here is not the mechanical one of what evidentiary value—if any—should be given to a *nolo contendere* plea; it is, rather, the duplication of discovery which is necessitated when a plea of *nolo* prevents private plaintiffs from obtaining any usable evidence from the government's antitrust investigation and prosecution. If our aforementioned recommendation of making CID files available to the public after conclusion of the government's case were to be adopted and extended to criminal investigation files, the issue of the evidentiary value of a *nolo* plea would be largely irrelevant.

There is recent precedent for such a proposal in the guilty plea of former Vice President Agnew. Neither the Justice Department nor the District Judge would accept a guilty plea unless the defendant agreed to public disclosure of the Department's charges, in very substantial detail. It is but a brief step from this precedent to the disclosure of the supporting evidence—at least to *bona fide* potential private plaintiffs, if not to the general public.

We disagree with the policy justification that the form of plea entered by an antitrust criminal defendant should determine whether potential private plaintiffs will be required to engage in duplicative discovery which may be so expensive as to discourage all but a few of the valid private antitrust suits which otherwise would have been brought in the wake of a government prosecution. Therefore, we urge the Committee to consider this recommendation for making public evidentiary files. At the very least, however, if this recommendation is not adopted, the *prima facie* evidentiary value of the *nolo contendere* plea as provided in § 601 should be established.

Attorney's fees

On May 12, 1975, the Supreme Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society* ruled that attorney's fees cannot be awarded to the lawyers for a successful party in federal litigation unless the case is brought under a statute specifically providing for such awards. Attorney's fees are presently awardable to successful private antitrust treble damage suit plaintiffs under the specific provisions of 15 U.S.C. § 15. However, the Supreme Court decision does mean that a private party plaintiff seeking only an injunction against continuation of an anticompetitive practice cannot recover attorney's fees. Since the purpose of S. 1284 is to improve and encourage enforcement of the antitrust laws, it would be appropriate and in keeping with this legislative purpose to include in this legislation an extension of the provision authorizing the award of attorneys fees to such non-damage cases.

TITLE VIII

Senator Bayh proposes to add to S. 1284 a Title VIII. This title would do two things. First, it would amend the Sherman Act to make a felony of predatory practices designed to exclude a competitor or potential competitor from business or any line of business, regardless of whether the intent or effect is to monopolize. Second, it would provide for penalties for certain Sherman Act violations which are proportional to the violator's gross revenues during the period of the violation derived from the line of business in which the violation occurred. The violations covered by this provision would include Sections 1—contracts, combinations and conspiracies in restraint of trade, 2—monopolies and attempts to monopolize, and 3A—the proposed new section on intentional predatory practices, of the Sherman Act.

We are uncertain as to whether this provision is or can be drafted with such clarity that a prudent business firm would not refrain from legitimate, hard competition which is in consumers' interest in order to avoid antitrust difficulties.

We agree that a penalty related in some way to the gains of an antitrust violation is a better deterrent and a better means of redress to the economy than a fine of a flat amount. The proposed provision which would set penalties at 20 percent of gross revenues from the line of business involved for the period of violation seems to be a reasonable formula, but the Court should be authorized to set a

penalty of greater amount if the government is able to prove that a greater amount was realized as profit from the violation. Additionally, we see no reason why this proportional penalty should not apply to violations of the present § 3—Sherman Act violations in the territories of the United States and in the District of Columbia—and § 8—illegal combinations, trusts, conspiracies and contracts in the import trade, as well.

Mr. Chairman, with these changes, we believe that the Committee will be prepared to recommend to the Senate a most important piece of antitrust legislation. We believe that it deserves the support of all of the members of your subcommittee, and of the Senate. Again, we thank you for your invitation to submit our views on this subject.

Senator ABOUREZK. Our next two witnesses are old friends of the subcommittee, Dr. Willard F. Mueller, and Dr. David D. Martin, who will testify together.

Dr. Mueller is former chief economist of the FTC, and now distinguished Vilas Research Professor at the University of Wisconsin.

Dr. Martin is former chief economist of this subcommittee, and is now professor of Business Economics and Public Policy at Indiana University. I would like to welcome you both. After each of the witnesses have completed their prepared statements, they will be asked to respond to questions.

Mr. MUELLER. Thank you, Senator Abourezk.

STATEMENT OF WILLIARD F. MUELLER, VILAS RESEARCH PROFESSOR, UNIVERSITY OF WISCONSIN

Mr. MUELLER. Although it is always a pleasure to appear before this committee, I am particularly pleased to participate at this time because of the increasing awareness of the need for antitrust reform. And today there is just a possibility that we actually may get new legislation, which would be a novelty in this area for the last generation.

As you know so well, until the last few years there was little sentiment for such reform. I think attitudes are changing, both on the part of economists, and the public at large.

There is a growing awareness that a great part of our economic system is dominated by tremendous centers of power and that unless such power is disciplined by market forces, more direct forms of government control are both necessary and inevitable.

As you know, as you have sat through these hearings, it is often difficult to arrive at a concensus among economists on any subject pertaining to antitrust policy; and especially so, when it involves a proposal for actual reform. This is hardly surprising since the issues are complicated; our empirical evidence is not conclusive; and inevitably economists' views are influenced by their values.

It is therefore significant, I think, that there appears to be quite widespread support for S. 1284 among economists. I requested that a letter [1] signed by over 70 prominent academic economists acknowledging such support be entered in the public record of these hearings.

In early May, Professor Martin, myself, Prof. William Shepherd, of the University of Michigan, and Prof. Mike Mann, of Boston University, sent copies of S. 1284 to something under a hundred academic economists known to be particularly expert and interested in the field of competition policy and asked them whether they supported the general principles of this legislation.

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[1] See p. 982.

We did not make any effort to run a popularity contest designed to maximize the number of signatures. We could have gotten a good many more. I see there are only five or so from the University of Wisconsin. But these happen to include all of the individuals who specialize in the area of industrial organization antitrust policy.

Some of the signators do not agree with every feature of S. 1284, and many others, including myself—and I suspect Professor Martin—believe the bill represents only a small first step toward needed reform. But I think, considering the short time involved, the fact that 70, of this fewer than 100 that we sent this to, responded affirmatively, indicates that there is substantial support among academic economists for this legislation. I am sure some of the signators will give you their individual comments on S. 1284.

I am in general agreement with all titles of the proposed legislation. But since you have witnesses particularly expert in the areas of titles II, III, IV, and VI, I shall restrict my comments to title V, the "pre-merger notification," provision.

I have been concerned for nearly two decades with the enforcement of section 7 of the Clayton Act as amended by the Celler-Kefauver Act of 1950. Since 1950 the antitrust agencies have brought over 200 cases, challenging over 1,000 acquisitions.

Based on my experience of 8 years in attempting to enforce this statute at the FTC, I feel confident in making the generalization that in very few of those cases where the Government ultimately prevailed has there been completely successful divestiture of the acquired unit.

By successful divestiture I mean the reestablishment of the acquired unit as an independent enterprise and the restoration of competitive conditions as they existed before the merger. Practically all cases have been concluded with (1) no divestiture, (2) token divestiture, or (3) divestiture of the acquired firm to another corporation, rather than its reestablishment as an independent entity.

I am familiar with very few cases where the acquired unit was reestablished as a going concern. I think this record represents a serious indictment of the effectiveness of enforcing section 7.

The defects of present merger enforcement activities might be summarized as follows:

(1) Defendents frequently now do not have an incentive to cooperate fully with the enforcement agencies and the courts in expediting litigation. Experience in this and other areas of antitrust has taught defendant attorneys that delay usually works to the defendant's advantage. The frequent result is needlessly long litigation, frequently exceeding a decade. The first litigated case under the Celler-Kefauver Act, *FTC* v. *Pillsbury Mills*, was litigated for 14 years.

(2) Once a merger is consummated, prolonged litigation results in the loss of competition during the period of litigation. If the merger is anticompetitive, the damage to the public interest continues so long as the merger remains intact.

(3) Protracted litigation and a history of inadequate relief tends to breed contempt for the effectiveness of the enforcement agencies. Rivals of a firm making an acquisition, even when the latter's acquisition has been challenged by one of the agencies, are encouraged to make defensive mergers, particularly in the case of vertical mergers—we documented this in the case of the *Cement Industry* when I was at the FTC—or defendants may simply gamble that their acquisition will not

be challenged. It is sort of like playing Russian roulette with the Government, only in this case there are a couple of thousand chambers, and each agency has about a dozen bullets to put in these chambers. And then when they fire, they miss the target; or if they do hit it, they do not injure the target mortally. This is really a serious situation, causing business to become contemptuous of the antitrust agencies.

If you are in Government, and you are trying to do a good and honest job, you tend to defend the agencies performance. But to be candid about it, the system just does not work very well at the present time. Because at best the acquiring firm is permitted to keep the acquired units while agreeing to make no further acquisitions; or at worst, it will be required to divest the acquisition to another company, usually at a profit over the original purchase price.

(4) Once a merger is fully consummated, it often is impossible to restore the state of competition existing prior to the merger. Frequently acquired companies assets are hopelessly scrambled with those of the acquirer, acquired plants may be closed, acquired brands may be eliminated, and key management of the acquired firm may be replaced.

So as a practical matter, the antitrust agencies and the courts often face a hopeless situation in seeking meaningful relief.

(5) Where protracted litigation results in actions, such as that mentioned, this situation may implicitly or explicitly influence the decision, on the part of the FTC or the courts, or the relief meted out by them. Frequently, once assets have been scrambled, in the case of the FTC, with which I am most familiar, relief has consisted solely in prohibiting further mergers, because after looking at the facts of life, the Commission believes it is tough to bring about a meaningful solution, so they simply require the company go and sin no more.

The *Pillsbury* case, which was the first case brought by either agency, represents an extreme example of this. After 14 years of litigation, during which Pillsbury had scrambled the acquired assets and abandoned one of the acquired brands, the Commission, when the case was finally remanded to it again, dismissed the case because it saw no way by which to achieve meaningful relief.

So long as firms are permitted to merge without first obtaining premerger clearance or before the case is litigated, there will be needlessly long litigation, adverse effects on the decisionmaking processes of the courts and the FTC, and inadequate, or worse still, meaningless relief.

I have only one recommended change in title V. It now applies to all acquisitions with $10 million in sales or assets. I suggest the language be changed to include acquisitions involving consideration paid of $10 million or more, because this is often a more meaningful measure than assets or sales. Very frequently firms that have assets of less than that are sold for consideration paid far exceeding $10 million.

The only reservation I have about the enactment of title V is that unless the agencies are given sufficient funding to enforce section 7, they will not be able to enforce this title effectively. This could lead to excessive delays in clearing some mergers that are legal. Or, worse still, some illegal mergers will not be challenged because the agencies will exhaust their resources going through the premerger clearance process.

I cite this potential problem, not because I believe it represents an inherent defect in the proposal, but to emphasize the need to make every effort to see that the agencies have adequate resources to enforce this bill if it is enacted.

On another matter, section 23 authorizes the FTC "after consultation with" the Justice Department, to promulgate regulations for implementing the notification provisions. I noted that in his testimony before this committee, the Assistant Attorney General for Antitrust objected to this provision, arguing that the language be changed so that any action taken by the FTC under this section should be taken only with the concurrence of the Attorney General. I disagree with this recommended change in the language. Because of the broader investigatory and administrative authority vested in the FTC as an independent agency, it should have primary responsibility in this area, and should therefore have final authority, after consultation as the bill provides, over the subjects covered by this particular provision. The alternative, I think, is that we may end up with a lot of bureaucratic bickering, a deadlock, or endless haggling between the agencies over relatively inconsequential matters.

Finally, some persons may reason that title V is not needed because the merger pace has slackened since the record levels of 1967–70, when more manufacturing assets were acquired than the combined total for all other years during 1948–73. It would be a gross mistake, however, to infer that the recent slowdown in merger activity makes it unnecessary to pass this title. History teaches that the recent slowdown in mergers is very likely only temporary, since merger activity always abates during recessions.

Second, merger activity already shows signs of reaccelerating. And third, merger activity of some companies has continued at a rapid pace since the general slowdown in the economy. For example, Beatrice Foods acquired over 30 companies during 1970–73.

So this is no time to be complacent about merger-induced industrial restructure. Rather, it is imperative that we use this period of relative calm in merger activity to perfect the antitrust laws in preparation for acceleration in mergers that will inevitably occur once economic growth resumes.

I would just like to make a couple of other comments that were prompted by Mr. Alioto, and some of the other previous witnesses. I too have observed this hostility on the part of the Department of Justice to both States and private individuals that bring private enforcement actions. It disturbs me, and somewhat perplexes me.

I think it is a kind of elitism on the part of the Department of Justice. Probably it runs more deeply than that. It may reflect the fact that most Assistant Attorneys General for the Antitrust Division come from defense-oriented law firms, and therefore come to the Justice Department with some views toward private suits.

Also, the Department of Justice simply settles too many conspiracy cases. The *Children's Books* case is a beautiful example. It was really started by this committee. A group of librarians who believed they had discovered a conspiracy complained to this committee. The Department of Justice thereafter reluctantly brought a case, which it subsequently settled. So when public bodies brought their suit to get damages, they were not able to rely on a court decision. They then had

to both develop not only the damages involved, but had to prove the conspiracy as well.

Also, Mr. Alioto mentioned that Mr. Handler asserted that statistical measures of total damages threatened to deny defendants due process. In my judgment, Mr. Handler's arguments at this point are pure nonsense.

In my experience aggregate statistical measures of damages may contain errors, but they generally do not err in measuring total liabilities of the defendants, but rather pose problems in distributing the benefits among the plaintiffs. I, therefore, cannot take seriously defendant-oriented lawyers, such as Mr. Handler, who argue that due process is going to be denied defendants. I think you have to be terribly naive to believe that they are genuinely concerned with protecting plaintiff's interests in this respect. That concludes my comments, thank you.

Senator ABOUREZK. Thank you. Mr. Martin.

STATEMENT OF DAVID DALE MARTIN, PROFESSOR OF BUSINESS ECONOMICS AND PUBLIC POLICY, SCHOOL OF BUSINESS, INDIANA UNIVERSITY, INDIANA

Mr. MARTIN. For me, it is a special pleasure to be invited to testify on the merits of the proposed Antitrust Improvements Act of 1975 although some may doubt that I am an unbiased witness.

During the 3 years or so that I served as chief economist of this subcommittee, I sometimes had occasion to disclaim that my views on some matters were those of the chairman or members of the subcommittee.

It is my hope today, however, that my view that antitrust needs improvement and that this bill is a useful first step in the right direction will turn out also to be the view of the subcommittee and that the bill will be enacted by the Congress very soon.

My opinion on the need for the bill stems not from any special authority vested in economists to pronounce judgement on such matters. In fact, it is my distrust of authority of any sort being invoked to tell people what is good for them that has led me to the conclusion that a competitive free enterprise market system of organizing man's economic activity is preferable to any alternative that I have knowledge of.

It seems particularly appropriate as we enter upon the 200th anniversary of the American Revolution that the Congress should make a new effort to reaffirm the policy of decentralized control of economic activity inherent in the Revolution itself.

Economics does not lead necessarily to the conclusion that a democratic society is preferable to some alternative structure in which the common man serves as a resource in meeting the needs of an elite class. Even slavery can be readily taken as given in economic analysis without destroying the utility of economic theory and the empirical methods of economic research. If, however, we still hold dear the values of the American Revolution and wish to extend freedom and economic opportunity to all persons, then it seems to me that economic theory can be useful in understanding better the probable consequence of alternative choices among rules of law.

As an economist whose teaching, reading, and writing for a third of the 85 years since the Sherman Act was passed have focused on antitrust policy, I will attempt to offer some personal judgments about some of the provisions of S. 1284.

First, on the Declaration of Policy, in title I: The six findings articulated in section 102 are justified, in my opinion. A number of the propositions stated therein, however, must be accepted as beliefs rather than as hypotheses of economic theory that have been or that are likely ever to be empirically tested and verified to the satisfaction of most economists. But, then, very few significant hypotheses of economic theory have been so tested and accepted generally. Paragraph (a)(1) of section 102 is the most important.

I agree that competition "spurs innovation, promotes productivity, prevents the undue concentration of economic, social, and political power and preserves a democratic society." I do not think that the economics profession has produced any persuasive evidence or arguments to the contrary.

A belief in the efficacy of competition in preventing undemocratic concentration of power, without loss of innovation and productivity, alone justifies the policy statement in section 102(b).

The other five findings, if correct, add urgency to the need for quick enactment of legislation with the purpose of increasing competition.

The findings in paragraphs (2), (3), and (6) of section 102(a) all have to do with the relationship between the degree of competitiveness of markets and the performance of the economy with respect to the generally accepted economic policy goals of balance in international payments, stability over time in the general level of prices and full utilization of labor and other resources.

The relationship between competitiveness of particular markets and such macroeconomic goals for the economic system is a crucially important relationship about which contemporary economic theory provides, unfortunately, very little in the way of generally accepted propositions.

Congress, however, need not continue to wait for economists to settle their differences before using their own commonsense and good judgment in this matter.

In my view, there is very little risk associated with erring on the side of increasing competition. Economic reasoning gives very little reason to fear that a more competitive economy would suffer worse problems of imbalance of international payments, inflation, or unemployment in the aggregate. Furthermore, in my judgment, there is much reason to conclude the contrary, that a more competitive set of conditions in particular markets would make easier the tasks of economic policy in accomplishing full employment without inflation.

In my prepared statement, I have elaborated to some extent on my reason for coming to that conclusion.

Although I do not claim to have a general theory that explains the consequences of monetary and fiscal policy under conditions of nonnegligible monopoly power, I do have a few conclusions to which I have come in my own thinking about the problem that lead me to agree with the findings declared in title I of S. 1284.

One conclusion is that monopoly power has become more pervasive since combinations in restraint of trade were legalized in 1895 by the Supreme Court's decision in the *E. C. Knight* case in which the Court held that a State-chartered corporation with 98 percent of the Nation's sugar refining capacity could not be disturbed by the Federal Government.

The great merger movement at the turn of the century followed from that decision, in my opinion, and technology and economies of scale had nothing to do with it.

After a century of generally declining prices coupled with rapid economic growth and the absorption of millions of immigrants into the labor force, we entered the 20th century with competition brought under control in most of manufacturing and mining.

I think that it was only because agriculture remained a substantial portion of all economic activity that the unemployment-inflation dilemma did not become more apparent much earlier.

Today, we do not have the cushion of a large agricultural sector to absorb the shocks of economic fluctuations. In fact, we now have more persons unemployed than we have working in agriculture.

One other conclusion that has also affected my judgment on the validity of the findings declared in section 102(a) is that monopoly power and restraint of trade affect investments in new plants and equipment, and the rate of technological innovation.

Both new capacity and better technology serve to reduce scarcity. Society benefits from the reduction of scarcity, but particular asset holders may suffer a loss of capital values.

Schumpeter coined the phrase "creative destruction" to describe this phenomenon. Those with an interest in capital values who have the power to do so will use their power to prevent the lessening of the value of their assets.

Monopoly results in control not only of shortrun pricing and production but also in control of the rate of increase in capacity and of the rate of innovation.

With a growing population and an even faster growing labor force, the unemployment is made worse by a slow rate of growth in capital. If that problem is remedied by any sort of measures to induce more capital accumulation by allowing or inducing higher prices, then the inflation problem worsened. With less restraint of trade and more competition, I think that a lower inflation rate would induce the private sector to provide enough jobs to employ fully the growing labor force.

There remains the question whether this bill, if enacted, would really make a significant contribution to a policy of competition. I will comment on several of its provisions.

The policy on corporate mergers and acquisitions, in the courts and in the Congress, can best be characterized as permissive until the Clayton Act was amended by the Celler-Kefauver Act in 1950.

The application of the Celler-Kefauver Act to horizontal mergers—that is, mergers of direct competitors—has been the only bright spot in antitrust enforcement for many years, in my opinion.

The merger law certainly should be enforced at least as well in the future as in the past.

Titles V and II, at least in part, of S. 1284, are aimed at that goal, and I think both provisions are worth while and should be enacted.

Two things concern me, however; one, I think it is absolutely essential that if premerger notification is required, the FTC and the Antitrust Division must be given adequate personnel and budget to perform the new duties that would be placed on them by title V.

Senator ABOUREZK. Excuse me, Dr. Martin.

We are in a bit of a time problem right at this point. I have to get over to the floor right away and Senator Hart cannot get right back since he is hung up at a Commerce Committee executive session.

Would it be possible to ask you to submit your prepared statement for the record because we would like to get our questioning in, of you, before we recess for lunch?

It is either that or hold you over until after lunch.

Mr. MARTIN. I am quite happy to stop at this point.

Senator ABOUREZK. OK, but if you want to, and I will leave you this choice, if you want to complete your statement, we would have to come back after lunch.

Mr. MARTIN. No; I think it would be better to go ahead with the questioning.

Senator ABOUREZK. OK. I will ask the majority counsel to proceed.

Mr. NASH. Since there are two witnesses at the table, maybe the best way to proceed would be to address the question to a particular witness whose statement seems to cover it and then since most of the questions are general, have the other witness comment if he feels inclined to add to the response.

With respect to Dr. Mueller's statement, I know that Senator Hart did have a chance to review it and was going to make the observation that your statement summarized quite succinctly the precise reasons for the introduction and inclusion of title V in S. 1284.

Now, I think it would be useful for the record if you could comment and give us a feel of the extent to which the present industrial structure of the economy, as we now know it, has resulted from mergers or acquisitions.

Mr. MUELLER. Well, it is my view, and I think the view of the majority of economists specializing in the field of industrial organization, that most existing concentration is directly related to the great merger movement around the turn of the century, the merger movement of the 1920's and, to a lesser degree, the merger movement of World War II and since.

Mergers have played a central role in creating the kind of centralized concentrated industrial structure we have today.

Mr. NASH. Do you have any observations you would care to make, Dr. Martin?

Mr. MARTIN. Well, I would just emphasize that the failure of the law to prohibit mergers at all between 1895 and 1904 is the real root of the problem.

During that period, between *E. C. Knight* and the *Northern Securities* case, it was absolutely legal to merge as much as could be negotiated and I think that that, in fact, did happen and, by and large, mining and manufacturing sectors of the economy were effectively brought under the oligopoly structure that we have been living with ever since.

And the more recent mergers have simply had the effect of further increasing market control and preventing the erosion of it that otherwise might have taken place from the inherent forces of competition.

Mr. NASH. The asset and sale provisions of title V, you know, $100 million for the acquiring company, $10 million for the acquired, have been criticized both as being too high and too low.

Chairman Engman would like to see the dollar figures raised because of the workload he believes would be generated at the FTC from those ceilings. Ralph Nader and Mark Green believe that the ceilings are too high, in that they believe that many smaller mergers at the local level are anticompetitive and would not be encompassed within title V.

Do you have any judgment as to the appropriate sales and asset amount to be set for title V? I recognize you recommend consideration, rather than a sale or asset. But with respect to the amount of $100 million and $10 million, do you have any observations?

Mr. MUELLER. Certainly in terms of the acquired assets, $10 million is a realistic number you can quibble about one way or another.

To say that it is too low, I think, is to miss the point, that in manufacturing, they only have about 2,600 or 2,700 companies of this size in the entire economy and currently there are only about 50 to 60 mergers at $10 million or more.

Firms of this size and larger constitute, I think, something like 80 percent of all manufacturing assets, so they are the ones we should be monitoring and I do not think it is too much of an enforcement job to scrutinize each carefully.

As to whether to lower it or not, I am in sympathy with the idea. I originally was going to make the recommendation that—like in the case of *Beatrice Foods* who acquired many firms—if they accumulate a certain number of companies that have combined value of a certain amount, they should be required to notify.

But I personally think that because the antitrust agencies can go after those additional mergers, if they wish, that $10 million is—and the fact that, on the other hand, it is not an excessive burden—there are not all that many mergers involved—that it is a reasonable kind of number to work with.

Maybe it is due to the fact, too, that I was responsible for creating the merger series that—of all mergers of $10 million or more and we have good records of that. So it is mergers of that particular size that I have some attachment to that number.

Mr. NASH. You commented that there were roughly 50 to 60 mergers that would be encompassed in title V. Is that to say that, on the average, there are about 50 to 60 acquisitions by $100 million or more companies of $10 million or more companies?

Mr. MUELLER. Well, it is actually somewhat less than that. This is in manufacturing, where, of course, most of the action is. Banks are already covered by other legislation. But manufacturing and trade—in recent years—there have only been between 50 and 60 acquisitions where the acquired company had $10 million.

Now, some of those—the acquiring companies were less than $100 million, so they, presumably, would not have been covered. So that is in manufacturing and that is sort of a maximum number that would be covered.

It reached a peak at the height of the merger movement of something in excess of 100, but when merger activity gets that wild, the antitrust agency should be—at frenzy—devoting a lot of resources to doing something about it.

Mr. NASH. Well, that being the case, and giving your experience as chief economist of the Commission for a number of years, how do you envision the staff carrying out the intent of title V when the filings come in? How much time do you envision being spent on it and how many people do you envision being required?

Mr. MUELLER. Well, I do not have a number in mind. At the FTC, the magic number, in terms of the ones that were given top priority work, those of $10 million or more, they were scrutinized, at that time, by the FTC share, which was something under half of the total, by a staff of about 30 lawyers and 20 economists.

They were not scrutinized adequately. I would think the staff should be at least double that if the FTC—on this matter, I think, with this kind of legislation, the companies would have a stake in cooperating in such a fashion that it would be possible to make a judgment much more quickly than it is now. Trying to get these facts at the present time is like pulling teeth; the companies drag on even though each agency has compulsory process, they still are rather slow in their responses.

And with this kind of legislation, since they have a definite stake in expeditious handling of the matter, I think they would cooperate more fully and it would be easier for the agencies to act expeditiously.

Mr. NASH. Dr. Martin?

Mr. MARTIN. I would simply say that I think the solution to the problem that Mr. Engman raises is for the Congress, if it passes the provision—to increase the budget and the personnel authorized for the FTC adequately so that the workload can be handled.

In Chairman Engman's judgment that that would be a problem, is, I think, an indication that something should be done along those lines if this bill is enacted.

Mr. NASH. Dr. Martin, in your prepared statement, you recommend that, per se, exemptions for stock acquisitions for investment purposes only should not be included in the premerger notifications provisions of title V.

I assume that you are not suggesting that any acquisition of stock, be it $1, $1 million, or $10 million, should be subjected to the reporting requirements of title V. Are you?

Mr. MARTIN. No; I am not. I am suggesting, though, that if you are requiring the reporting of acquisitions that are greater than a certain size, that you should not make an exception to the requirement that acquisitions of that size be reported ahead of time simply because the acquirer asserts it to be for investment purposes only.

And when I read the statement in the press release announcing the first set of hearings, it was just a very brief statement, and I interpreted that to mean that someone had suggested to the committee that there should be a proviso put in the prenotification provision, like the original proviso in section 7, and I do not know just what form that would take but I would simply urge that very great care be taken that that is not done in such a way that simply because the acquirer asserts "we don't intend to manage the company, we

just want to hold 25 percent of its common stock for investment purposes" that that not be a basis for saying no one should look into it.

I think that is particularly important in view of the fact that such vast amounts of capital are being transferred abroad today with the energy situation as it is, and resulting in, I think, substantial acquisitions of common stock in American companies that affect, potentially, the control, though at first it might appear that control is not involved. That is my concern.

I think, for example, in 1911, the court dissolved the Standard Oil Co. of New Jersey in a very superficial way by pro rata spinoff. The result was that you are left with a whole lot of people holding small amounts of stock for investment purposes only. But they are the same people who controlled the trust.

The investment proviso in the 1914 legislation, I think, was not a good idea because much of the problem in concentration of power consists not in a lot of assets in the hands of a few corporations but a lot of corporations in the hands of a few investors.

Mr. NASH. Thank you very much.

I have no further questions, Mr. Chairman.

Mr. CHUMBRIS. Just one point, Mr. Chairman. It is in relation to the letter that Dr. Mueller is submitting to the chairman regarding the number of economists who have indicated an interest in this bill.

I notice 15 of the names are economists who have appeared before us over the past 18 years. I might say I did not see the names of a great number of those economists who take opposite positions from those of the 70 economists that have signed this letter.

I have one letter that came in the other day, and it is dated the 27th, from an economist who teaches at the University of Virginia and who worked for the majority side years ago as an intern. He stated:

> I am enclosing a reprint of a recent article by a colleague of mine and myself. I think it has some bearing on parts of S. 1284 which prevent me from supporting the bill.
>
> The provisions of that bill which would support private action are, at least from an economic standpoint, most unfortunate.

It is from Kenneth Elzinger who teaches at the University of Virginia.

I ask that this letter [1] be made part of the record and the statement, which I do not have with me now, be made a part of the record also.

Senator ABOUREZK. Without objection.

Mr. MUELLER. I might say, Mr. Chumbris, that lest the impression be given that this list was a totally biased list, Mr. Elzinga was invited to give his views on this and he, likewise, sent me the reasons why he did not support it, reasons which I totally disagree with, by the way.

Mr. CHUMBRIS. I am not being critical. The gentlemen who signed this have that right, but I am pointing out that there are many others who have appeared before the subcommittee for a number of years who are not on this list.

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[1] See p. 728.

Mr. MUELLER. You have got some professional witnesses.

I did not send it to Mr. Weston either.

Mr. CHUMBRIS. I have no further questions Mr. Chairman.

[The prepared statement of Mr. Martin follows. Testimony resumes on p. 419.]

PREPARED STATEMENT OF DAVID DALE MARTIN, PROFESSSOR OF BUSINESS ECONOMICS AND PUBLIC POLICY, SCHOOL OF BUSINESS, INDIANA UNIVERSITY

For me it is a special pleasure to be invited to testify on the merits of the proposed "Antitrust Improvements Act of 1975," although some may doubt that I am an unbiased witness. During the three years or so that I served as Chief Economist of this Subcommittee I sometimes had occasion to disclaim that my views on some matters were those of the Chairman or members of the Subcommittee. It is my hope today, however, that my view that antitrust needs improvement and that this bill is a useful first step in the right direction, will turn out also to be the view of the Subcommittee and that the bill will be enacted by the Congress soon.

In 1890—some eight-five years ago—the Congress enacted the Sherman Act. Like S. 1284, the Sherman Act was designed to improve the administration of a policy of competition deeply rooted in the traditions and law of the Nation created by the American Revolution. The Sherman Act made nothing unlawful that was not already unlawful at common law and in many state codes. Its purpose and effect was to move enforcement of the policy of competition to the Federal level of government and thereby improve enforcement in an economy that by 1890 had become very much inter-state in character. The Sherman Act was aptly titled "An Act to Protect the Public against Unlawful Restraints and Monopolies." The "Antitrust Improvements Act of 1975" is urgently needed today because the public today, as in 1890, is inadequately protected against unlawful restraints and monopolies.

My opinion on the inadequacy of the protection of the public from unlawful restraints and monopolies stems not from any special authority vested in economists to pronounce judgment on such matters. In fact, it is my distrust of authority of any sort being invoked to tell people what is good for them that has led me to the conclusion that a competitive, free enterprise, market system of organizing man's economic activity is preferable to any alternative that I have knowledge of. It seems particularly appropriate as we enter upon the two-hundredth anniversary of the American Revolution that the Congress should make a new effort to reaffirm the policy of decentralized control of economic activity inherent in the Revolution itself.

In his introductory remarks on the floor upon the introduction of S. 1284, the Chairman made the point that during the eighty-five years since the Sherman Act was enacted the Congress has only on five occasions augmented the laws protecting our economic freedom. For precisely half of that 85-year period I have been observing our economic system from one or another vantage point and asking myself and others for explanations of why it does not function better than it does. It was just forty-three years ago that my father lost his job in 1932. Even though I was not quite eight years old at that time, the reality of the Depression forced itself upon my consciousness. I am one of many middle-aged men and women who are products of that depression. My perceptions of the consequences of alternative public policies with respect to the structure of control of economic activity were heightened as well by the coincidence of my becoming seventeen years old in "the summer of 1942" and having to confront the reality of war ostensibly fought to protect our democracy from the threat of the corporate state as realized in Japan, Germany, and Italy. When I re-entered college as a sophomore in 1945, my commitment to the idea that society must better structure itself to assure individual freedom and economic security to each person was so firmly rooted in my mind that seven more years of formal education in economics was powerless to dislodge it. I became an economist because I was an antitruster—not the other way around.

Economics does not lead necessarily to the conclusion that a democratic society is preferable to some alternative structure in which the common man serves as a resource in meeting the needs of an elite class. Even slavery can be readily taken as a given in economic analysis without destroying the utility of economic theory and the empirical methods of economic research. If, however, we still hold dear the values of the American Revolution and wish to extend freedom and

economic opportunity to all persons, then it seems to me that economic theory can be useful in understanding better the probable consequences of alternative choices among rules of law. As an economist whose teaching, reading, and writing for a third of those eighty-five years have focused on antitrust policy, I will attempt to offer some personal judgments about some of the provisions of S. 1284.

TITLE I—DECLARATION OF POLICY

The six findings articulated in Section 102 are justified in my opinion. A number of the propositions stated therein, however, must be accepted as beliefs rather than as hypotheses of economic theory that have been or that are likely ever to be empirically tested and verified to the satisfaction of most economists. But, then, very few significant hypotheses of economic theory have been so tested and accepted generally. Paragraph (a)(1) of Section 102 is the most important. I do believe "that competition spurs innovation, promotes productivity, prevents the undue concentration of economic, social, and political power, and preserves a democratic society." I don't think that the economics profession has produced any persuasive evidence or arguments to the contrary. A belief in the efficacy of competition in preventing undemocratic concentration of power, without loss of innovation and productivity, alone justifies the policy statement in Section 102(b).

The other five findings, if correct, add urgency to the need for quick enactment of legislation with the purpose of increasing competition. That record rates of unemployment with inflation have caused and are causing hardship is not likely to be denied by anyone. That excessive concentration and anticompetitive behavior exist in various industries will be denied by a significant and articulate segment of the economics profession. If they be right, little harm will be done by this bill. If they be wrong and if the bill proves effective, then much good will result. In my judgment it would be better to err on the side of accepting, even if untrue, the hypothesis that excessive concentration and anticompetitive behavior exist in various industries. In answering that question, I am more willing to trust the judicial process than the economists' statistical analyses of the grossly inadequate publicly available data. The stakes are too high for our society to ride along much longer in the hope of preserving democracy in the face of unbridled economic power in the hands of a few.

The other three findings—in paragraphs (2), (3), and (6) of Section 102(a)—all have to do with the relationship between the degree of competitiveness of markets and the performance of the economy with respect to the generally accepted economic policy goals of balance in international payments, stability over time in the general level of prices, and full utilization of labor and other resources. The relationship between competitiveness of particular markets and such macroeconomic goals for the economic system is a crucially important relationship about which contemporary economic theory provides very little in the way of generally accepted propositions. Congress, however, need not continue to wait for economists to settle their differences before using their own common sense and good judgment in this matter. In my view, there is very little risk associated with erring on the side of increasing competition. Economic reasoning gives very little reason to fear that a more competitive economy would suffer worse problems of imbalance of international payments, inflation, or unemployment in the aggregate. Furthermore, in my judgment there is much reason to conclude the contrary—that a more competitive set of conditions in particular markets would make easier the tasks of economic policy in accomplishing full employment without inflation. I will elaborate to some extent my own reasons for coming to that conclusion.

First, the body of economic theory that attempts to explain the consequences of alternative monetary and fiscal policies for such macro-economic goals as price stability and full employment is based on the *assumption* that particular markets within the system are competitive. If not perfectly competitive, such particular markets are assumed to deviate from perfect competition by negligible amounts. That the economy has failed to function at full employment without either inflation or price controls at anytime since the E. C. Knight decision emasculated the Sherman Act in 1895 is significant empirical evidence that market imperfections are *not* so slight as to be negligible. There is no economic theory with which to predict the consequences of alternative monetary and fiscal policies under conditions of non-negligible monopoly power in particular markets.

Economists who are asked whether monopoly causes inflation usually approach that question by asking what the effect of monopoly is in a particular market on price and employment. The theory of particular markets explains the effect by

comparing two alternative market structures at a point in time. The conclusion is that with a monopoly structure price will be higher and output lower than with a competitive structure. Thus the micro-economic theory—that is the static theory of markets—leads to the conclusion that a *change* from competition to monopoly would result in a one-shot increase in price and reduction in employment in a particular market, but that continuation of a condition of monopoly indefinitely would add no further to either the inflation or the unemployment problem. Some economists, I think, would argue that there would not even be a one-shot effect from a change to monopoly in one industry if all other markets are perfectly competitive because only relative prices would be changed and the resources not used in the monopolized sector would be instantaneously and automatically picked up and used in other markets if appropriate monetary policies were followed.

This conventional wisdom of economists is all right as far as it goes. But it really doesn't tell us very much about an economy in which monopoly power has become so pervasive as to have become the rule rather than the exception. With a very large highly competitive sector and a few isolated pockets of monopoly the economy, in my opinion, could be guided by monetary and fiscal policy along the growth path of full employment and price stability. It is for that reason that I think that a serious effort at antitrust is a worthwhile measure with which to cope with the worsening problem of unemployment-cum-inflation.

A general theory of employment, interest, and money based on the assumption that monopoly power is a significant characteristic of much of the economy would be very useful, indeed. I wish that I were smart enough to produce that theory, and I hope that others will do so. In the absence of such a theory, it seems to me that economics ill-serves the public interest if economists insist on denying the reality of monopoly.

Although I don't claim to have a general theory that explains the consequences of monetary and fiscal policy under conditions of non-negligible monopoly power, I do have a few conclusions to which I have come in my own thinking about the problem that lead me to agree with the findings declared in Title I of S. 1284. One conclusion is that monopoly power has become more pervasive since combinations in restraint of trade were legalized in 1895 by the Supreme Court's decision in the E. C. Knight case in which the Court held that a state chartered corporation with 98 percent of the nation's sugar refining capacity could not be disturbed by the Federal government. The great merger movement at the turn of the century followed from that decision, in my opinion, and technology and economies of scale had nothing to do with it. After a century of generally declining prices coupled with rapid economic growth and the absorption of millions of immigrants into the labor force, we entered the twentieth century with competition brought under control in most of manufacturing and mining. I think that it was only because agriculture remained a substantial portion of all economic activity that the unemployment-inflation dilemma did not become more apparent much earlier. Today we do not have the cushion of a large agricultural sector to absorb the shocks of economic fluctuations. In fact, we now have more persons unemployed than we have working in agriculture.

In a free society in which individuals are free to make individual decisions about what to spend their income on and in which technological change is encouraged and in which relative scarcities are changing, demand and supply in particular markets will and should fluctuate. The problem of economic stability is the problem of keeping the aggregates stable through time. Particular prices ought to go up and down to reflect changes in relative scarcities. Concentration of economic power in the hands of persons with no responsibility for stabilizing the whole economy thwarts the power of monetary and fiscal policy to accomplish those ends. Those with power in particular sectors of the economy have incentive to stabilize prices and profits and push onto their own hourly workers and other sectors the burden of responding to fluctuations in demand. A more competitive structure would result, I think, in many little tremors and fewer earthquakes. The effect of monopoly and restraint of trade on the flexibility of particular prices is the key connection between the theory of markets and the theory of inflation and unemployment.

One other conclusion has also affected my judgment on the validity of the findings declared in Section 302(a). Monopoly power and restraint of trade affect investment in new plant and equipment and the rate of technological innovation. Both new capacity and better tecynology serve to reduce scarcity. Society benefits from the reduction of scarcity but particular asset holders may suffer a loss of

capital values. Schumpeter coined the phrase "creative destruction" to describe this phenomenon. Those with an interest in capital values wo have the power to do so will use their power to prevent the lessening of the value of their assett. Monopoly results in control not only of short-run pricing and production but also n control of the rate of increase in capacity and of the rate of innovation. Wish a growing population and an even faster growing labor force the unemploymetn s made worse by a slow rate of growth in capital. If that problem is remedied by any sortjof measures to induce more capital accumulation by allowing or inducing higher prices, then the inflation problem is worsened. With less restraint of trade and more competition, I think that a lower inflation rate would induce the private sector to provide enough jobs to employ fully the growing labor force.

There remains the question whether this bill, if enacted, would really make a significant contribution to a policy of competition. I will comment on several of its provisions.

MERGER POLICY PROVISIONS

The law on combinations in the form of corporations chartered under liberal state incorporation statutes has been the major antitrust policy issues ever ince the Sherman Act was passed by Congress in 3890. The legislature of the state of New Jersey, in its wisdom, made about four dozen changes in its general incorporation statutes between 3888 and 3893. The effect was to legalize the trusts and to facilitate combination of large numbers of corporations doing business all over the world into a single center of decision making without conspiracy. The E.C. Knight case held the Federal Securities was decided in 3904. Although the power of the Federal government was ultimately upheld, the policy on corporate mergers and acquisitions in the courts and in the Congress can best be characterized as permissive until the Clayton Act was amended by the Celler-Kefauver Act in 3950. The application of the Celler-Kefauver Act to horizontal mergers—that is, mergers of direct competitors—has been the only bright spot in antitrust enforcement for many years in my opinion. The merger law certainly should be enforced at least as well in the future as in the past. Titles V of S. 3484 and Title II, at least in part, are aimed at that goal and I think both provisions are worthwhile and should be enacted.

Both these Titles would help to nip mergers in the bud, and certainly the incipiency doctrine that led to the enactment of the Clayton Act in 3934 still holds today. Two things concern me, however, One, I think it is absolutely essential that if premerger notification is required, the Federal Trade Commission and the Antitrust Division must be given adequate personnel and budget to perform the new duties that would be placed on them by Title V. Perhaps the bill itself should be changed to make the necessary authorizations of both personnel and budget. If this augmentation of the resources of the agencies is not in fact accomplished then the purposes of the provision will not be accomplished.

In the proposed Section 23(g) contained in Section 501 of the bill the acquiring corporation would be required to dispose of unlawfully acquired stock or assets "at a price not to exceed the purchase price." That language bothers me a bit. I agree with its intent to prevent ill-gotten gains by the acquirer, but I am concerned that, in all cases of increases in value while the litigation proceeds, it would require a sale below a market-clearing price. Therefore, some non-price rationing would be required and somebody necessarily must get a windfall. Though the provision is intended to prevent a windfall to the acquirer, the power to grant a windfall to others is itself a windfall, since some sort of quid pro quo would likely result. Perhaps such windfalls should go to a special fund to augment the budgets of the enforcement agencies!

As I read Section 501, it would apply to asset acquisitions by all corporations irrespective of whether they are made by corporations subject to the jurisdiction of the Federal Trade Commission. If that is the intent I support it, but it might be better to make that change in the current statutes more explicit to avoid misinterpretation by the courts. I think the failure of the Celler-Kefauver Act to do so was unfortunate, and in a section dealing with large acquisitions it seems particularly appropriate to make no exceptions on grounds of the nature of the business of the corporations.

In his press release announcing the first set of hearings on S. 1284, the Subcommittee Chairman mentioned that questions had been raised about the possible need to change Section 501 to exempt stock acquisitions for investment only. Perhaps some new language is needed to take care of that problem, but I strongly urge that you not do it in a way that grants per se exemptions to stock acquisitions

just because the acquirer asserts the acquisition to be for investment purposes only. The bill should require that any acquisition of the size that would being it under this notification provision should be scrutinized by the enforcement agencies to ascertain whether it may substantially lessen competition. If it is found probably to have that effect, then it should be treated *per se* as not for investment purposes only. After all monopolizing is itself a very good investment if it is legal and you can get away with it. With the extremely large number of stock acquisitions likely to be made soon by a small number of acquiring foreign corporations and governments, it seems to me essential that the investment "loophole" in Section 7 of the Clayton Act be closed. Otherwise we may soon find increased concentration of control of our economy with even greater difficulties than we now have; both in finding out who really controls, and in reaching them with the antitrust law.

ADMINISTRATIVE AND PROCEDURAL PROVISIONS

The other sections of the bill make very specific changes in the code to accomplish improvements in antitrust enforcement generally. On most of these I don't feel particularly well qualified to speak, but I find nothing that I perceive to be objectionable. Title II would improve the flow of information to the Antitrust Division and I think that would be worthwhile. Title III, strengthening penalties for violating FTC orders, and Title VI, making nolo contendere pleas prima facie evidence of law violation, are both aimed at increasing the deterrent effect of the antitrust laws and I think that is worthwhile. Title IV would also increase both the deterrent effect of the law and increase enforcement activity by encouraging the fifty state attorneys-general to bring cases. Businessmen's behavior is very likely to be affected favorably by measures such as these to increase the chances that antitrust violations actually will prove to be unprofitable.

Sections 701 and 703 would extend the reach of the Federal antitrust law inward toward commerce within states and outward toward commerce with foreign nations and corporations. The latter purpose seems more urgent. The limitations on the reach of the American law and courts in a world of multinational corporations and state trading, however, are not likely to be dealt with adequately by antitrust legislation alone. I would hope that the Nation's foreign policies generally will soon be redirected toward those World War II goals of competitive world markets operating under rules of law. If that is done with the same vigor with which we have pursued the illusory objectives of the Cold War for the past quarter century, there will still be hope of a democratic and peaceful world order. Section 703 is not inconsistent with that objective.

Section 702 deals with judicial administration in antitrust cases. Since its enactment would hold out some hope that economists or economic experts can contribute to this extremely intractable problem, I will make a few comments on its provisions and raise a few questions.

COMPLEX CASES

Antitrust cases are complex today because companies are now large, complex bureaucratic organizations. The judiciary, fortunately, has remained relatively untouched by the trend to bureaucracy so characteristic of most institutions today. I would not like to see the judiciary transformed into another large, bureaucratic institution. Yet we must make it effective in handling antitrust litigation or abandon the policy of competition.

The President has become the Presidency. We don't want the judge in each case to become a judiciary. Yet Judge Neville's testimony on S. 1167 on May 8, 1973, made clear that judges need more effective staff services than they are getting now, from clerks and secretaries. Section 702 of S. 1284 is addressed to this problem. I am in favor of its enactment, but I fear that it will be innocuous unless the language of the bill is elaborated somewhat or the legislative record makes evident the intent of Congress to direct the judiciary to change its procedures in complex antitrust cases. Even with more explicit instructions from Congress, constitutional objections will be raised unless care is taken to anticipate them and meet them.

Section 702 is limited to antitrust cases in which the United States is the plaintiff. Judge Neville's testimony convinces me that private suits for damages and private suits seeking injunctive relief can be as complex as those brought by the Antitrust Division. I recommend that the section be changed, or a new provision be added to the bill to provide for more expeditious and equitable

procedures in private cases as well. That may best be accomplished with a separate statement by which Congress directs changes in the Federal Rules of Civil Procedure. I suggest that Judge Neville's testimony be made a part of this record.

Section 702 would change Section 21 of Title 15 of the code. Perhaps Title 28 should also be amended in order to assure that Rule 53 is appropriately changed. I merely suggest that possibility, but I claim no expertise on that legal issue.

Section 702 would give the Attorney General the power to declare, at his discretion, the case to be a "complex antitrust case." The judge would then be required "to cause the case to be in every way expedited." The next two sentences say: "Special masters, economic experts, and other personnel may be designated to assist the trial judge in the expeditious and efficient trial of the case, and in expediting discovery and pretrial matters. Economic and other experts may be used by the court in all phases of the trial, including the preparation and analysis of plans for relief." The implication is clear that the use of special masters, economic experts, and other personnel assisting the judge is expected to expedite complex cases. I think good staff work can improve judicial management, to use Judge Neville's phrase, but putting more people on the job will not necessarily expedite a case particularly if their use itself gives rise to additional litigable questions. In fact, Vanderbilt's *Modern Procedure and Judicial Administration*, 1240–41 (1952), goes so far as to say: "There is one special cause of delay in getting cases on for trial that must be singled out for particular condemnation, the all too prevalent habit of sending matters to a reference. There is no more effective way of putting a case to sleep for an indefinite period than to permit it to go to a reference with a busy lawyer as a referee."

Judge Irving R. Kaufman, writing in the *Columbia Law Review* in 1958 in an article entitled "Masters in the Federal Courts: Rule 53," offers a pertinent analysis of problems associated with the use of masters, and I suggest that that judge's views might also be made a part of the record of this hearing along with the 1958 *Report #12 of the ABA Committee on Practice and Procedure in the Trial of Antitrust Cases.* The latter document contains a statement on the use of masters in antitrust cases. It concluded: "The essential and seemingly insoluble problems appear to be (a) the assurance that the master would be competent and skilled in the field and (b) to provide adequate compensation." That conclusion may also be applicable as well to the use of economic experts.

Section 702 does not indicate whether it contemplates the use of economic experts as special masters. That seems to me to be a possibility that may be desirable in some but not all circumstances. The classic case of good use by a judge of economic staff assistance was the role of Carl Kaysen as a clerk to Judge Wysanski in the United Shoe Machinery case. That sort of use of economists might be the best use to which they can be put in solving the problems of the complex case. One use to which I would not recommend putting economists is that of an authority on matters that properly should be judged by the judge. I do not recommend using economists the way that doctors are used in sanity hearings, for example. Judge Kaufman, in his article on Rule 53 said: "American policy, stated quite simply, upholds the right of a litigant to have his suit tried before a judge and/or jury if he so requests. * * * It is axiomatic, of course, that every reference involves some delegation of powers usually reserved to the courts.

"An example of a judicial function which the courts are most reluctant to surrender is that of assessing the credibility of witnesses * * * Where factual determinations are to be primarily resolved on the basis of conflicting testimonial evidence a reference should be avoided."

What about an economic expert (as opposed to a judge) resolving conflict among sets of statistical data? To avoid such problems of due process, I think that the economist must be brought in early enough in the proceeding to affect the evidence admitted. He can help the judge to get into the record what he needs to advise the judge. That may be evidence that neither party gives high priority to getting into the record. If the equity implicit in the judicial process is to be preserved—and I think it should be—then the economist should be at the right hand of the judge to offer suggestions for questions from the bench to witnesses. He needs also to participate in pre-trial and post-trial hearings. And judges must be authorized and encouraged to take some initiative in getting appropriate facts admitted. On the question of how to accomplish that, I suggest that you consider amending S. 1284 to incorporate some of the language of S. 1167, on which this Subcommittee has already held extensive hearings. Section 305 of S. 1167 contains proposals to amend the Rules of Civil Procedure directly by

changing Part VI of Title 28 of the Code to include a section on expert witnesses and on other witnesses. That language might be useful in this bill.

Equally as important as the procedural language used in this section on complex cases is the manner in which the Congress provides incentives to the judicial administrators to induce actual changes in the behavior of judges in antitrust cases. I'm sure the Congress had great expectations in 1914 when it authorized the courts to use the Federal Trade Commission as a master in chancery in antitrust cases, but as far as I know that has never happened. Judges do not like to be over-ruled. Their authority to innovate in handling complex cases must be explicit and current law makes the use of masters possible only in exceptional circumstances even in antitrust cases. This statute should take care of that problem if it clearly enough changes Rule 53. But we still must contend with Judge Neville's concern and with the ABA Committee's concern about the funds with which to pay the added costs of the new procedures. I suggest that the bill be changed to authorize the necessary expenditures and that a special fund be provided in the appropriations bill for the judiciary along the same lines as is now done, I believe, for the salaries and expenses of Referees in Bankruptcy. Whatever method is used to trigger the declaration of a case to be a complex case should automatically provide the budget with which to pay the salaries and expenses associated with special masters, economic experts and other expediting personnel. The funding should be done in such a way that wholehearted judicial cooperation in expediting the complex antitrust cases can be accomplished without subtracting from the funds available to take care of other matters before the courts.

If the bill is amended to include provisions for declaring private antitrust suits to be complex cases, it seems to me that the expeditious handling of such cases should also be funded publicly. The purpose of private suits, after all, is not just to provide relief to the plaintiff but to deter violation of the law and enhance the probability that antitrust law violation will be detected and prosecuted. The cases brought as parens patriae by the state attorney general will also be complex. A problem arises, of course, of who should be given the power in cases other than those in which the United States is the plaintiff to declare the case to be complex. Perhaps that power should be vested in the senior judge in the district or in the circuit court of appeals after a motion by either party. If the funding is adequate, then the judiciary should not require more prodding from outside. If the funding is inadequate, or the constitutionality of the new procedures is unclear, then a declaration by the Attorney General will be of no avail in any event.

When one considers all the obstacles to effective antitrust enforcement after eight-five years of the antitrust charade, the judicial management problem looms very large. This provision could set in motion very important changes that might make competition a viable alternative to the continued drift toward the corporate state. I think it deserves the Subcommittee's very careful attention.

TITLE VII—SHERMAN ACT AMENDMENTS

Senator Bayh's proposed amendments to S. 1284 seem to me to be a worthwhile addition to the antitrust law.

One of the earliest orders issued by the Federal Trade Commission under Section 5 of the FTC Act required a Mr. Smith to cease and desist from causing his trucks to collide with the trucks of a Mr. Brown. I have often used that case as a vivid example of an unfair method of competition. The courts have gradually broadened the meaning of Section 5 of the FTC Act to make unlawful under that provision most anything that would be a violation of the Sherman Act, and properly so since monopolizing and restraining trade certainly are unfair methods of competition. Senator Bayh's amendment would add a section 3A to the Sherman Act to accomplish the reverse. It seems to me that his proposal would make unfair methods of competition that are not now reachable under the Sherman Act subject to that statute. That is warranted I think because Section 5 is enforced only by the Federal Trade Commission and perpetrators of unfair methods of competition are not now subject either to criminal sanctions or treble damage or other private suits. Today the injured party must take his chances in the mail bag of an inadequately funded Federal Trade Commission. Although the proposal is limited to a very narrowly defined category of unlawful conduct, the exclusion of competitors or potential competitors from engaging in a trade is patently so offensive to the policy of competition that the provision can be of considerable importance.

The amendment is aimed at correcting the unfortunate trend in recent court decisions of forcing the plaintiff to bear too heavy a burden of proving that he is being excluded from a "relevant market" from which his exclusion is likely to constitute the proximate cause of illegal monopolization. This abuse of the "relevant market" concept is a problem not only in this type of case but in antitrust enforcement generally. Ironically, in one of the earliest Sherman Act cases, Judge William Howard Taft (in Addyston Pipe and Steel) saw more clearly than most contemporary lawyers and economists that monopoly power can itself change the boundaries of the market. Judicial doctrine that forces the plaintiff to prove something to be the one and only relevant market in a case can easily become a threat to effective enforcement in many areas of the law. The Subcommittee may make some use of an exchange of views between myself and another economist on this issue published in the *American Economic Review* in June 1964. This amendment's provision removing the relevant market inquiry in cases in which specific intent to exclude is proven seems to me to be clearly warranted.

The proposed Section 3B seems also to be a worthwhile addition to the law. Not only would it add the Attorney General of the United States to the fifty state attorneys general who would be authorized to bring suit for monetary reparations for public injury, but it would for the first time make possible the forfeiture of an amount of money related to the ill-gotten gains of the offender rather than to proven damages to injured parties. The deterrent effect would be great.

CONCLUSION

The Antitrust Improvements Act of 1975 would significantly improve antitrust enforcement in my judgment. The enactment of a statute with that intent and effect would constitute a clear signal that the Congress intends to treat competition policy with the higher priority it must have soon if the market system is to survive.

Senator ABOUREZK. If there are no more questions, I want to express my gratitude to the witnesses and to all who have appeared this morning.

Thank you.

We will recess now.

[Whereupon, the hearing was recessed at 12:10 p.m., to resume at the call of the Chair.]

S. 1284—THE ANTITRUST IMPROVEMENTS ACT OF 1975

THURSDAY, JUNE 12, 1975

U. S. Senate,
Subcommittee on Antitrust and Monopoly,
of the Committee on the Judiciary,
Washington, D.C.

The subcommittee met at 1 p.m. in room 5110, Dirksen Senate Office Building, Hon. Philip A. Hart (chairman of the subcommittee) presiding.

Present: Senator Hart.

Also present: Howard O'Leary, chief counsel; Bernard Nash, assistant counsel; Patricia Y. Bario, editorial director; Catherine M. McCarthy, chief clerk; and Peter N. Chumbris, minority chief counsel.

Senator Hart. The committee will be in order. The hearing this afternoon is a continuation of the hearings of June 3 and 4 which were canceled because of Senate obligations.

I apologize now to the several witnesses for the inconveniences because of it, and appreciate very much that so many were able to return today.

Without objection I will have printed in the record, the statements prepared by those witnesses who were unable to return today, namely: Mr. A. G. W. Biddle, Computer Industry Association;[1] Prof. John Flynn, University of Utah Law School;[2] Prof. Louis Schwartz, University of Pennsylvania Law School;[3] and Mr. Charles Binsted, National Congress of Petroleum Retailers.[4] And we have received other written statements from interested persons. These also will be made a part of the record.

Our first witnesses today are David Watkiss of Salt Lake City, and John Dougherty of Washington, D.C.

Mr. Dougherty was the "lone Government counsel" during some 7 years of litigation seeking divestiture by El Paso National Gas Co. of its Northwest Division.

Mr. Watkiss, during that same period of time, was involved in the litigation representing a company seeking to acquire that division.

Gentlemen, we welcome you.

Let me order—lest we forget—that there be printed in the record, in full as though given, all of the prepared statements presented today.

[Mr. Watkiss' prepared statement appears on p. 423.]

Senator Hart. You may proceed in such order as you prefer.

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[1] Mr. A. G. W. Biddle, p. 568.
[2] Prof. John Flynn, p. 535.
[3] Prof. Louis Schwartz, p. 564.
[4] Mr. Charles Binsted, p. 563.

STATEMENT OF DAVID K. WATKISS, ATTORNEY FROM SALT LAKE CITY, UTAH; ACCOMPANIED BY JOHN H. DOUGHERTY, ATTORNEY, WASHINGTON, D.C.

Mr. WATKISS. Mr. Chairman, it is our pleasure to appear before you today, and talk about the experience we have both had in connection with the *El Paso* case which, I believe, was one of the more protracted, complex, and possibly well-publicized antitrust divestiture cases.

I should make a disclaimer at the outset that I am not a professor of antitrust law nor consider myself a scholar or even a student of antitrust. I am merely a trial lawyer that got involved, some years ago, in this very protracted piece of litigation.

And, as I indicated, I represented one of the applicants for acquisition who succeeded in taking over control of the new company that was finally divested some 17 years after the litigation was commenced in 1957, and some 10 years after the Supreme Court entered its order requiring divestiture without delay.

I am not going to talk today, about those first 7 years when the litigation was involved with determining whether or not there had been a section 7 violation, but only with respect to the problems of divestiture and why, in my opinion, legislation, such as you are proposing, is needed in order to avoid the damage to the public interest that comes about through many years of protracted litigation that are now required to accomplish a statisfactory divestiture during which time a monopolistic condition or an anticompetitive condition is allowed to be perpetuated because there is no effective means at the outset to stop an unlawful acquisition and no efficient means to unravel it easily and expeditiously.

I believe the *El Paso* case had a salutary effect despite its long and anguished years because the business community watched with great interest to see whether or not the Justice Department would persevere, and whether or not the courts would persevere until a satisfactory remedy—one that would be approved by the Supreme Court—was finally achieved.

I am sure you all know something of the history of this case—it went to the Supreme Court, I believe, on eight different occasions.

Mr. Dougherty and I both got involved in the proceeding in 1967 in what is known as Divestiture II, which then began out in Utah.

Mr. Dougherty was assigned by the Justice Department to this case—he was known to all of us, with a certain amount of affection, to be a lone Government counsel—and who was dispatched way out West with a railroad car full of materials that had been accumulated and put together over the first 10 years of the case to attempt to effectuate a very, very complex and difficult divestiture.

The way the case had developed and the way he was assigned—point up some of the problems, I think—that need attention and that your committee should probably better understand in connection with remedial antitrust reform.

Mr. Dougherty had no background in the oil and gas industry, as far as I know, or any particular experience with regulated utilities such as an interstate pipeline company.

On the other hand, *El Paso*, with its extensive experience and enormous resources, instead of being represented by one lawyer,

would never have less than three in court during the many years that we contested this case—usually more than that—with scores of experts nearby, either in the court or just down the street in hotel rooms.

Now, when you consider that we were involved in a highly technical and complex industry such as this, and were contending with the difficult problems inherent in divestiture, you can see the imbalance in representation and resources that existed in this proceeding.

The matter was further complicated by the fact that there were 29 other parties that were permitted to intervene in the case by the decision in *Cascade*. This was a significant decision of the Supreme Court also overturned the first divestiture order which had been stipulated to by the Department of Justice, and accented by the lower court without hearings. The case had reached the Supreme Court on the narrow issue of whether or not other entities that could show an interest or a possible aggrievement by the results of the case had standing to appear and participate as parties. The court reversed on the ground that the lower court should have permitted intervention, and then reached behind that narrow issue and overturned the approved divestiture plan.

This intervention decision complicated the complex proceeding further because all of the Western States and all of the gas distribution companies in the Western States were permitted to intervene as parties, thus including 29 additional parties. On top of that, 10 applicants sought to acquire the assets to be divested.

We used to assemble in a courtroom out West with so many people that the jury box was filled with lawyers.

The "Divestiture II" trial was lengthy—beginning after preliminary conferences, in the fall of 1967 and not concluding until the summer of 1968 with about 11,000 pages of transcript.

Another complicating factor was that the apparently strongest applicant, Colorado Interstate, was the only other interstate pipeline in the case, and its selection by the Court created additional antitrust problems that were subsequently presented to the Supreme Court resulting in another reversal.

We thus wound up having yet another divestiture proceeding, known as Divestiture III, which began in 1970, and extended through 1972, with another 8,000 or 9,000 pages of transcript, and the same parties participating, but this time with only seven applicants.

One of the reasons why divestitures are prolonged and difficult is the fact that it is clearly in the defendants interest to fight as long and as hard as possible in order to keep the acquired properties or business as long as possible for there is no punishment, nor adverse result that the courts can impose. The acquiring defendant can look forward to retaining all of the profits that can be realized, and to the benefit of the substantial business advantages of monopolization or a preferred competitive position for which it does not have to account no matter how long divestiture is delayed.

The way it works out, the so-called wrongdoer or the company who has violated the law comes before most Federal judges in a very preferred position. Not only are none of these very significant benefits taken away, but the courts are usually deferential and solicitous to the defendant and turn over the structuring of the relief, by default or otherwise, to the supposed miscreant, the party who is responsible for treating the problem.

Now, there are a lot of reasons why this approach is taken and that is why I believe your bill is very important.

One, the Government does not seem to have the resources to go in and do the difficult job that is necessary to effect appropriate relief.

Secondly, the courts are involved in an unfamiliar, technical area, and do not usually have adequate resources for the divestiture job. So it falls, almost by default, on the party that is in the dock, to voluntarily structure a strong, competitive force that is supposed to come out of the proceeding and, in effect, take them on in the marketplace.

Obviously, this will just not happen unless there are some pressures exerted and requirements put upon the defendant to do just that. In our case this was only provided by the Supreme Court. Each and every time *El Paso* would sweep the deck or carry the day in the trial court, but the case would then, years later, come again to the Supreme Court with an inadequate divestiture plan, one that had not restored the competitive balance or the competitive position that was the purpose and the goal of the proceeding, and it would be reversed and sent back.

These are some of the things that we learned from the *El Paso* case. In addition, we saw that a company, with great resources, can muster tremendous political influence; can come back to Congress and, despite a Supreme Court speaking with a unanimous voice in 1964 in finding a violation of the antitrust laws can come up to the Hill and get committees, both in the House and in the Senate, to hear it plea to forgive and forget and nearly come away with special legislation that would have removed many years of judicial effort in antitrust enforcement.

There was no doubt in anyone's mind on that Supreme Court that there was a violation by *El Paso*. And yet with the time-worn arguments that you really cannot effectively recreate competition after a number of years, that market conditions had changed, and that the result may be the destruction of one strong utility and the putting in its place of two weak ones so that the public interest would not be served. They almost carried the day. This was frustrating and ironical to those of us who had participated in the proceedings in Denver because we knew that the arguments being made to committees on the Hill here were the reverse of what had been represented in the trial court where the evidence was that this new company would be strong, viable, and competitive, as would *El Paso* unless more assets than those proposed for divestiture by *El Paso* were required to be divested.

A dissenting and discerning voice likened the pleas to Congress for special legislation to the situation where the burglar pleads to keep the stolen goods because he can put them to a greater advantage than the true owner.

But despite the fact that the pleas made no sense to us, they seemed to make a lot of sense to some people up here, and the forgiveness bill to avoid divestiture received substantive support indicating a lack of understanding by Congress of antitrust objectives and procedures.

Most of my comments on the proposed legislation are set forth in the statement that I have presented. I had some qualifications with respect to certain portions of the bill which I have there indicated. There is one I would like to clarify, and that is with respect to section

23, subparagraph G—where you are proposing to sequester profits or escrow profits, and to put a lid on what the properties might be sold for on divestiture.

Here, you are requiring the party who has acquired the properties and is now ordered, because it has been determined the acquisition was illegal, to divest the properties. To divest them for no more than they paid for them. There can be no profit.

Now, I am very much convinced that we need to take the economic advantages and the profits out of illegal acquisitions in order to discourage such activity.

At the same time, you should not, in any law that you pass, make it so difficult and so onerous that legitimate acquisitions, some of which are even procompetitive, are inhibited unduly.

Now, this is a difficult task.

I objected to the escrowing of profits, and I objected to the putting a lid on the purchase price because I felt that the trial courts should be left with this discretion.

I do believe, however, that it would be well for you to consider putting in your title I, declaration of policy—which I think is title I, subparagraph B—that it should be the objective, and must be the objective of effective antitrust enforcement that the profits and the advantages of an unlawful acquisition should be, if at all possible, removed in a divestiture, and that the profits cannot be retained and a purchase price in excess of what was paid for it should not be permitted unless the court can make a finding, an express finding, that in these particular circumstances that cannot be reasonably accomplished.

The only other caveat that I would suggest to you to consider is that if profits are covered and a purchase price is limited, there may be a tendency not to maintain the acquired properties, nor to have the acquired company continue to effectively operate and compete.

This concerns me because, you see, you are only concerned in 23–G with after there has been an acquisition and you are going into divestiture. Now, after there has been an acquisition, even if only of controlling stock, the party who is the defendant in the case decrees the destiny of that company until divestiture is accomplished.

And I am concerned that if they are limited in what can be realized upon divestiture, they may reduce or destroy a competitive business by sheer neglect. So that when it is divested, it will not be divested with the strength and force and competitive position that we need to effectuate the antitrust policy in the public interest.

Thank you for the opportunity of addressing you.

Senator HART. Thank you for the background you have given us on an acquisition and divestiture which was of interest to a great number of Senators.

[The prepared statement of Mr. Watkiss follows. Testimony resumes on p. 430.]

PREPARED STATEMENT OF DAVID K. WATKISS, ATTORNEY, SALT LAKE CITY, UTAH

Mr. Chairman and Members of the Subcommittee: I am David K. Watkiss, a lawyer from Salt Lake City, Utah. I am pleased to respond to this Subcommittee's request to testify on S. 1284 and deem it a privilege to appear and present testimony before this distinguished body. While S. 1284 covers a number of important antitrust subjects, I will restrict my comments to what I consider to be

one of the most important issues and, which I suspect, is also one of the most controversial, "Title V, PREMERGER NOTIFICATION".

My comments here today, are expressed solely on my own behalf and represent strictly personal views, which were developed for the most part, during my experience over a period of some seven years as Chief Counsel for the successful applicant in the well publicized diverstitute proceedings *United States of America vs. El Paso Natural Gas Company*. This case described by former Assistant Attorney General Richard W. McLaren as one of the Justice Department's more important enforcement actions and characterized in a Wall Street Journal editorial as "Antitrust Gone Mad" was discussed and reviewed in numerous articles, one of which termed it "The Unnatural Gas Case." This case provoked a great deal of controversy and contained most of the classic problems found in a divestitute proceeding. Personally, it provided me a concentrated practical experience in the problems of divestitute as the result of my active participation in two extensive divestitute trials and in the subsequent technical negotiations and detailed planning that were necessary to complete the divestitute and put the new company into operation.

If Title V had been on the books twenty years ago, I would likely have never had this interesting seven-year course in divestitute. It is my understanding that this Title provides that corporations with total assets or annual net sales of more than $100 million are required to provide sixty days notice before acquiring or merging with another corporation having total assets or annual net sales of $10 million or more and the same notice is required if the combined assets or sales of the acquiring and acquired companies exceed $100 million. If the Justice Department or Federal Trade Commission files suit within the sixty day notification and waiting period challenging the legality of the proposed merger or acquisition, the court must prevent the consummation of the merger until the validity of the merger is adjudicated if the government certifies to the court that the public interest requires such an injunctive order. Authority is given the antitrust enforcers to waive the sixty day period and to exempt certain types of transactions. Future challenges to a merger under § 7 of the Clayton Act are not barred if suit is not filed during the sixty day period, but in such event, the merger may proceed to be consummated. With certain reservations that I will mention at the conclusion of my remarks, I support Title V.

It must be acknowledged by anyone with any experience and understanding that divestitute is, at best, a difficult remedy, with an inherent risk that it will not succeed. Nevertheless, divestitute where feasible is, in most instances, the only truly effective remedy for violations under § 7 of the Clayton Act because it is the only possible way to restore something close to the premerger competitive situation.

A review of antitrust enforcement over the years reveals a judicial reticence to order divestiture by lower courts charged with working out the details of divestiture while the Supreme Court has insisted that divestiture is the normal remedy in cases of a violation of § 7 of the Clayton Act. This reluctance by trial judges appears to result from a belief that divestiture is the most drastic form of relief and should only be ordered as a last alternative, and also from the view that the courts are, in large measure, incapable of dealing with the complex economic issues inherent in divestiture. Judicial procedures and hearings are ill-equipped for the role of developing the relevant economic data needed to determine the most effective means for restoring competition in a particular industry and market area. Even if such technical data could be developed and presented, it is often difficult for judges to understand fully the non-legal aspects of the economic issues involved because of their lack of economic and financial training. These obvious limitations in the courts lead to judicial caution and the risk of failure in fashioning the relief required to remedy as well as can be, the damage done by the illegal acquisition.

In *International Salt Company vs. United States*, Justice Jackson pointed out the importance of securing such effective relief from trade restraints in antitrust cases:

> "A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendant's illegal restraints. If this decree accomplishes less than that, the government has won a lawsuit and lost a cause." [1]

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[1] 332 U.S. 392, 401 (1947).

Unfortunately, a number of cases reveal a clear victory in the battle of proving a violation, but something far less than victory in the vital remedial phase, the goal of antitrust enforcement.

A brief review of the history of the El Paso litigation and the difficulties encountered in structuring an effective divestiture decree which met the criteria required by the Supreme Court illustrates the need to avoid divestiture by maintaining the separate identities while the violation is litigated if this can be reasonably and responsibly accomplished. While a successful divestiture was finally obtained after nearly seventeen years of litigation, this prolonged period of time with its attendant economic uncertainties and changing market conditions, together with the considerable expense and effort required to finally achieve a satisfactory result, graphically points out this need.

El Paso Natural Gas Company (El Paso) was organized and commenced business as a natural gas pipeline transmission company in 1928. It began supplying natural gas to the State of California in 1947. Pacific Northwest Pipeline Corporation (PNW) was certified by the Federal Power Commission in 1955 to supply natural gas to the Pacific Northwest, particularly the States of Oregon, Washington and Idaho. The PWN pipeline was constructed to deliver gas supplies from the San Juan Basin in northwestern New Mexico. Supplemental sources of gas were obtained by PNW from Canada.

PNW had an excess supply of natural gas for its new and developing market with access to even greater amounts from British Columbia. It, therefore, began discussions with certain California consumers to determine if it could supply California with these additional gas supplies. El Paso, the sole supplier of gas from outside California thereupon commenced negotiations to acquire all of the stock of PNW and this stock acquisition was consummated in 1957. Almost immediately, the Justice Department filed suit against El Paso under § 7 of the Clayton Act contending that the acquisition substantially lessened competition in California.

A month after the filing by the Justice Department, El Paso applied to the Federal Power Commission (FPC) for approval of an asset merger of the two companies under § 7 of the Natural Gas Act. Confusion and controversy followed which forum should proceed first with the District Court finally deciding to wait for the Commission to proceed. In December of 1959, the FPC approved the merger and it was immediately consummated.

The State of California appealed the FPC order and in 1962, the United States Supreme Court held that the Clayton Act suit against El Paso's acquisition of control should have been tried in the Federal District Court before the FPC permitted the consummation of the merger and that the regulatory authority of the FPC did not empower the Commission to immunize the transaction against antitrust attack under § 7 of the Clayton Act.[2] The FPC order was vacated and the case remanded to the United States District Court for the trial of the Clayton Act violation. Subsequently, the District Court found that El Paso's acquisition of PNW did not tend to lessen competition for the California market. The Justice Department appealed this decision and in 1964 the Supreme Court reversed holding that the acquisition did, in fact, violate § 7 of the Clayton Act and ordered "divestiture without delay" remanding the case back to the District Court for compliance with the mandate.[3]

In 1965, the District Court endorsed a plan of divestiture that had been negotiated by El Paso and the Justice Department and submitted upon stipulation of these two parties, who were then the only parties to the suit. However, this decision was appealed to the Supreme Court by the State of California, Southern California Edison, a large electric utility which was an industrial user of gas, and Cascade Natural Gas Co., a gas distribution company in the Pacific Northwest, whose sole supplier of gas had been PNW and would be the new company. These three appellants, together with other gas distribution companies and state regulatory commissions, had unsuccessfully attempted to intervene in the case and be heard on the conditions of the divestiture plan. The Supreme Court reversed determining that intervention should have been afforded to all persons who might be adversely affected by the disposition of the acquired property, overturned the divestiture decree, and laid down criteria for an effective divestiture with the direction that another district judge be appointed to conclude the case and that the district court make meticulous findings in support of a new divestiture plan.[4]

[2] *California* v. *F.P.C.*, 369 U.S. 482 (1962).
[3] *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964).
[4] *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

The Supreme Court noted that the plan that had been formulated fell far short of restoring the acquired company "to a position where it could compete with El Paso in the California market." The criteria set forth for an effective divestiture plan required detailed consideration of the following matters, among others:

1. *Gas Reserves.*—Certain reserves developed after the acquisition were to be "equitably" divided with a view toward making the new company an effective competitor in the California markets.

2. *Financial Aspects.*—Consideration was to be given as to the assets required by the new company so as to provide it with a capital structure adequate to restore vigorous competition, with particular regard to the restructuring of long term debt.

3. *Control of Divested Company.*—The illegal combination was required to be completely severed and conditions imposed to insure that El Paso interests could neither acquire nor exercise any control.

Divestiture hearings began in 1967, with intervention granted at the outset to 29 new parties who thereafter participated in the proceedings. These numerous new parties were most of the western states and customers of El Paso who were located in such states. They fell into two antagonistic groups, those that would remain with El Paso and those that would become solely dependent on the new company for their supply. There were ten applicants to acquire the new company who were required to present their respective qualifications, divestiture plan and how they would operate the new company and particularly how they intended to reinstitute competition in the significant markets. These applicants were also permitted to participate in a more limited way in the hearings. There were, thus, counsel for some 40 parties engaged in the trial presentation of the testimony.

The actual presentation of testimony began in October of 1967, and proceeded intermittently until the summer of 1968, when a new divestiture decree was issued. This new decision by the district court departed somewhat from the Cascade guidelines, but such departures were justified as being within the spirit of the mandate and necessary to establish a "strong company capable of restoring the lost competition in the California market." The district court found that El Paso's reserves were insufficient to support the needs of El Paso and the new company and at the same time provide sufficient gas to the new company to mount a California project. In an effort to insure the ability of the new company to acquire the needed new reserves and to otherwise vigorously compete, the district court chose the financially strong and experienced Colorado Interstate Gas Company (CIG), the only gas pipeline operator among the applicants, to acquire the new company rather than selecting a sale to interests outside the gas pipeline industry. This choice raised antitrust problems on its own for the anticompetitive restraints found objectionable in the original acquisition were likewise put in question by the new company being divested to another potential competitor in the California or northwestern markets and an actual competitor for gas supplies for such markets. The court's choice, however, was obviously a conscientious attempt to insure competent and established management of the new company while compensating for the court's inability to provide sufficient reserves to inaugurate substantial potential competition in California.

This decision was appealed to the Supreme Court by several of the parties including the State of Utah, State of California, and the Department of Justice. Before jurisdictional statements were submitted by all but Utah, the appellants each settled their conflicting interests and agreed to dismiss or not perfect their respective appeals. Despite the attempt of the parties to dispose of the appeal, the Supreme Court in an extraordinary, unprecedented action, overturned the district court's divestiture plan, and required a further reallocation of gas reserves with the objective of restoring the new company to "the same relative competitive position viz-a-viz El Paso in the California market as that which PNW enjoyed immediately prior to the illegal merger." The district court was directed to reconsider other prospective purchasers in light of the reallocation and to include in its consideration whether an award to a particular applicant would have any anticompetitive effects. The high court also indicated that there had remained an improper intermingling of corporate interests under the rejected plan and that "only a cash sale will satisfy the requirement of complete divestiture." [5]

Petitions for rehearing delayed the remand of the case back to the District Court for a year, but finally in 1970, new divestiture hearings were commenced

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[5] *Utah Public Service Commission v. El Paso Natural Gas Company*, 395 U.S. 464 (1969).

with the same parties, but this time with only seven applicants for acquisition. The difficult problem of establishing New Company so that it could compete as effectively as PNW had been able to do, some 15 years earlier, despite the existence of different economic circumstances in the natural gas industry where competition had shifted from markets to obtaining natural gas supplies, was manifest to all participants. The considerable volumes of reserves necessary to be divested to the new company if it was to immediately support a California project could not be divested without impairing the ability of El Paso to maintain its existing level of gas deliveries to its customers. Very lengthy hearings were required to solve these and the other issues which were not concluded until June of 1972. The findings and decree then entered by the court were subsequently amended on August 30, 1972, with the selection of the Apco Group as the successful applicant. Again, the district court's decision was appealed to the Supreme Court, but this time the Supreme Court refused to review and the lower court's decision became final in March of 1973.

The court proceedings were thus concluded some 15 years after the suit was filed and 8 years after the acquisition was held illegal and "divestiture without delay" ordered. There was, however, a number of difficult tasks yet to be performed before divestiture could actually be effected. Negotiations between the Apco Group and El Paso were pursued for several months to resolve certain issues such as the purchase price to be paid and the disposition of some non-utility assets, which the court had left for negotiation. These issues were finally concluded only after the court had been informed that an agreement could not be reached, and on the eve of the hearing the court had scheduled for the resolution of such issues. Thereafter, months were taken up in negotiations with the institutional investors and in the restructuring of the long term debt to be assumed by the new company. Terms and conditions of the new bonds and debentures had to be agreed upon and the complex documents then printed and signed by over ninety institutions. The printing bill alone for these new company debt instruments totalled in excess of ½ million dollars and El Paso had an even larger bill for printing new instruments that were also required for it.

Also, during this final period, the staffing of key positions, structuring of organizational charts and final development of operational plans were required to be completed, together with the creation of detailed accounting procedures and computer programs. Fortunately, El Paso had operated the acquired assets as its Northwest Division and had maintained separate books of account pursuant to FPC requirements for this Division, or the divestiture would have been even more complicated. In the middle of these final preparations to launch the affairs and operations of a company with annual gross sales in excess of $200 million and some 1,000 employees, the vital Canadian gas supplies to be divested to the new company and which would constitute some two-thirds of the daily gas deliveries were substantially curtailed and then subjected to a dramatic price increase creating serious unforeseen problems for the new management.

The substantial expense involved in the prosecution of the El Paso case from its initiation in July of 1957, until divestiture was finally achieved in February of 1974, has never been publicly documented. The following financial information will give some idea of the costs that were incurred in only the last seven years of the divestiture proceedings beginning in 1967, after the remand of *Cascade:* Each of the ten applicants that participated in the divestiture proceedings which were known as Divestiture II beginning in 1967, spent at least a quarter of a million dollars with some applicants spending a substantially greater amount. The seven applicants in Divestiture III, which began in 1970, following the *Utah* decision spent even greater sums than those spent in the earlier divestiture because of the extended period of time required in the resolution of the difficult question of what reserve divestiture could be made to provide the new company a competitive opportunity in the California market. Colorado Interstate, expended a total of $2½ million as an applicant in both of these divestiture proceedings. The Apco Group expended over $1 million in participating only in the final hearings in Divestiture III. The cost to organize Northwest Pipeline and structure it ready for divestiture was in excess of $2 million with additional costs for the long term debt roll-over of approximately $850,000 and a FPC filing fee of approximately $200,000 for the required certificate. In order to provide a complete separation of the two companies, a voting trust was established to last five years and insulate the new company from any potential control of the El Paso stockholders. The annual cost to El Paso during the years of this voting trust will be in excess of $½ million.

In addition to the lengthy and expensive court hearings and the prolonged period after the court proceedings were concluded before divestiture could be effected, there were also activities concerning this case in both the Senate and House of Representatives of the United States Congress with an attendant expenditure of substantial sums. On several occasions following the determination by the Supreme Court that divestiture was required, El Paso attempted to preserve the illegal merger by promoting special interest legislation in the form of a "Forgiveness Bill". Prolonged uncertainty of such questions as when divestiture would take place, who would acquire the divested properties, and what gas supply policy the acquiring firm would pursue caused great anxiety in the state commissions responsible for regulating natural gas supplies provided by El Paso's Northwest Division and with officials responsible for running gas distribution systems dependent on such supplies. Because of this understandable anxiety and the skepticism that a satisfactory divestiture could never be accomplished which developed over the years of continuing Supreme Court reversals of divestiture decrees, considerable support was developed in the west for this special legislation.

Committees in both houses of Congress heard testimony aimed at showing that divestiture was not necessary and not in the public interest. Assertions were made that divestiture would result in the creation of two weak companies instead of the one strong one (El Paso), which was then providing much of the natural gas supply to the western states. Detailed arguments were constructed and presented that the new company would be incapable of furnishing responsible gas service and of effectively competing for new gas supplies. It was also contended that divestiture would adversely affect the realiability of gas supplies for both companies and severely reduce the reliability of gas service in the west.

These charges created concern in the halls of Congress as to the economic viability of the two companies that would result from the divestiture and this concern, together with the frustration which had resulted from the many years of uncertainty in the western natural gas industry almost resulted in the passage of the special legislation pursued by El Paso. This in turn could well have triggered new litigation over the constitutionality of reversing final litigated judgments by an act of Congress.

I am happy to report to you that Northwest Pipeline Corporation, the new company created by the divestiture, is alive and very well and that fortunately, none of the ominous predictions materialized. Northwest Pipeline is not only a viable, strong, expanding new company, but I believe it is also fulfilling the hopes of those who kept the faith and pursued this antitrust effort by giving its customers a reliable gas supply and providing competition and new initiatives in the natural gas industry. El Paso also is in good health remaining one of the largest and strongest utility companies in the United States with no apparent impairment, as a result of the divestiture, in its ability to serve its market requirements. While "divestiture without delay" was certainly not achieved, the fundamental goal of antitrust policy was, I believe, finally fulfilled by the re-established status quo ante acquisition.

But consider the extraordinary expenditure of time, as well as resources, which have been devoted to this effort. While there is no tally of the total cost that was made in seeing this case through to complete divestiture, it is safe to say it ran into many millions, employed hundreds of lawyers, accountants and others, consumed great quantities of the scarce resources of our courts, and left a non-competitive market structure in the gas industry in the west for a decade after that market structure had been declared unlawful by our highest court. Another incalculable, but very significant cost was the substantial loss of the time and talents of key El Paso executives from their important jobs of running a major utility and developing new sources of energy supplies in a time of growing energy shortages because of the inordinate demands made upon them in the defense of this antitrust proceeding. Surely, we can come up with a better way to enforce the important public policy of § 7 of the Clayton Act.

Any new legislation to improve antitrust enforcement must, however, be carefully considered and constructed because all mergers and acquisitions are not necessarily anti-competitive and, in fact, some are pro-competitive and economically desirable. Therefore, such activity should not be unduly inhibited. The burden should continue to rest on the government to challenge only those mergers which appear to threaten competition, but certainly such challenges should be based upon an informed understanding of the facts to the fullest extent possible. Furthermore, a court should have some discretion in prohibiting the consummation

of a merger pending final judgment and some lattitude in tailoring the relief needed to restore as fully as possible competitive conditions similar to those which prevailed before the unlawful merger.

Title V, as now written, is not limited to mergers alone and the broad language could be construed to cover any acquisition of an asset by one entity engaged in commerce from another entity engaged in commerce. While this Title contains helpful proposals, it appears that it would profit from further study and with tightening and clarification. The following are certain suggestions for your consideration:

1. Some fixed limit should be placed upon the time in which an enforcement agency can hold up a merger in order to receive and evaluate information. This would provide needed certainty and create an initiative for the agencies to proceed to evaluate the situation as quickly as possible.

2. Transactions which do not pose any potential anti-competitive problems should be specifically identified to the fullest extent possible and excluded from the notification requirement.

3. While certain regulatory agencies (such as the FPC) do not have power to pass upon antitrust questions, applications and filings are made with such agencies with respect to asset acquisitions. Coordination must be achieved between agencies of government in order to avoid unnecessary duplication in the filing of informational material, and thus, all other agencies should be required to provide access to the Justice Department and the FTC of all informational materials filed with them.

4. Consideration should be given to making all information provided and requested pursuant to this law confidential in nature, unless litigation is initiated.

5. Even with such a confidentiality requirement, it would appear that prenotification will make very difficult the surprise stock tender offer because of a need for secrecy and stock market timing. This could prove in some circumstances to be anti-competitive by insulating entrenched management from the risk of adversary non-negotiated take-overs. For this and other reasons, consideration should be given in making some distinction between the requirements for stock and asset acquisitions. A stock acquisition does not necessarily provide commingling, which makes divestiture so difficult, but can, of course, result in anti-competitive market control.

6. While a stay order should be required to issue upon the government's request based upon a responsible and informed judgment made after reviewing the required pertinent information, some discretion should be given to the District Court to lift such a stay order upon an appropriate showing by the Defendant that there will be no commingling, and that any required divestiture may be readily consummated, and that there is no reasonable probability of a significant lessening of competition pending final litigation of the case.

7. The requirement that the divestiture order include profits held in escrow and fix a sales price for all divested assets not exceeding the purchase price of such assets is too rigid and deprives the court of the flexibility needed in order to fashion appropriate divestiture relief in light of existing conditions and the particular problems of each case. There is also the obvious corollary problem of selecting a buyer to obtain a potential windfall by acquiring an asset package at a price below its fair market value.

I believe that Title V of S. 1284 with some modifications will provide an improved approach to the divestiture problem. If the eggs of a potentially unlawful acquisition or merger can be kept unscrambled and the economic incentives of pursuing such acquisitions and mergers or for delaying any subsequently ordered divestiture can be minimized or removed, the El Paso experience may become an object of historical curiosity rather than an unfortunate and exaggerated example of the necessary course of a divestiture proceeding.

It is a universal truth that effective antitrust enforcement is vital to our nation's economic well-being. Present business conditions make this even more evident and important. Today's energy shortage, as well as serious problems in a number of industries and areas of our economy, would seem to require a vigilant and efficient antitrust enforcement effort. Legislation which will aid the responsible, effective enforcement of antitrust policy should be favorably acted upon by this Committee and Congress.

Senator HART. Mr. Dougherty?

STATEMENT OF JOHN H. DOUGHERTY, RETIRED ATTORNEY, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, FALLS CHURCH, VA.

Mr. DOUGHERTY. Thank you, Senator. In my prepared statement,[1] I took the opportunity to offer a few suggestions regarding S. 1284, particularly in light of my experience.

As I understand that that prepared statement has been received for the record, I will simply attempt to summarize it.

My name is John H. Dougherty. I retired December 31, 1974, from the Department of Justice, Antitrust Division. Naturally, I do not speak for the Department, either as of now or as of the time of events in the past that I have mentioned in my prepared statement or may mention now.

I appreciate the warm things Mr. Watkiss said about me, and I think he is to be commended for the statement that he has made.

In fairness to him, however, since he has been grouped with me in this appearance, I want to say that I do not speak for him either. He is not bound by anything that I may say. I speak for myself, alone.

In the Department of Justice, I spent 12 years in the Antitrust Division, primarily as a trial attorney, representing the Department in various merger cases.

One of these was the *El Paso* case, which involved the acquisition by El Paso Natural Gas Co. of its potential competitor, Pacific Northwest Pipeline Corp., in 1957, and the merger of the two at the end of 1959.

That case lasted for 17 years, from 1957 to the divestiture on February 7, 1974. I was the Government attorney employed in the trial of that case for the last 7 of those years, as the chairman has noted, and Mr. Watkiss, and the only one during those 7 years, except for 1 week toward the end of the case.

I spent a long time on that case and others. In the process, I formed some ideas about needed changes in the law, and I see many of these in title V of S. 1284.

I like the whole idea of premerger notification. Premerger notification would have spared us the *El Paso* case, an ordeal for every one of us the case touched.

In my case, it took 7 years of my life. I think I can say premerger notification would have spared us that ordeal, with confidence, for when the Supreme Court came to the merits of that merger in the *United States* v. *El Paso Natural Gas Co.* in 1964, the Court said—and I don't have the exact wording, but I believe it is close—"If El Paso can absorb Pacific Northwest without violating section 7 of the Clayton Act, that section has no meaning in the natural gas field."

So it was 17 years from the time El Paso first took over Pacific Northwest, to when the case ended on February 7 of last year, 1974, with the divestiture which created the successor to Pacific Northwest Pipeline, today known as Northwest Pipeline or Northwest Energy.

Preliminary or premerger notification, I believe, would have prevented this 17-year suppression of competition over an enormous area of the Western United States.

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[1] See p. 436.

Now, I also like the provisions in proposed section 23(g) for relief pendente lite in a suit challenging a merger or acquisition and for further relief upon an adjudication of unlawfulness.

As I say in my prepared statement—and I am reading now:

> I favor the provision in the new section 23(g) of the Clayton Act for the Court to order the acquiring company or defendant, to hold the acquired stock or assets separately, and to place the profits therefrom in escrow. This requirement would accompany the provision that the Court is to determine the price at which the stock or assets were acquired; the provision that that price shall be the ceiling on what the defendant can realize in a divestiture by sale; and the provision that the impounded profits are to be transferred, along with the stock or assets, unlawfully acquired, presumably to the divestee. I have three small suggestions to make as additions to these provisions and not as substitutes for them. Additionally, some of these provisions may not fit a given situation. It should be made possible to waive enforcement of them in that situation. I would suggest the bill authorize waiver if the trial court expressly finds that the provision is inapplicable or enforcement would be contrary to the findings and policy declared in title I.

The first of my suggestions is this. I think, as Mr. Watkiss was just saying, that the tax advantages should be taken out of merger; the financial rewards should be taken out of merger; and I think the tax advantages of operating losses, accumulated or prospective, should be removed as an incentive to merger and acquisitions, but only where the merger or acquisition has been found to be in violation of the antitrust laws.

In my prepared statement, I gave the example of the $53 million operating loss that Pacific Northwest brought into the merger with El Paso, a loss that Pacific Northwest could not use, losing money itself, or making very little; and how, just to save the first $9 million from being lost to El Paso, everyone collaborated to rush this illegal merger through to consummation by December 31, 1959; even though it was certain that the FPC's hasty merger authorization was going to be appealed and even though the antitrust suit challenging El Paso's takeover of Pacific Northwest in 1957 in the stock acquisition had not yet gone to trial.

The $53 million tax loss, in other words, even the first $9 million of it, was too much of a temptation. That temptation should be removed.

No one could resist it. Look what they did: How the institutional investors—I mean the lenders—had their lawyers draw up the bond mortgage in advance of the go-ahead from the FPC to merge.

The lenders had signed the new mortgage, a consolidated mortgage, early in December, before the FPC had even acted; indeed, while the FPC had still to hear oral argument on the merger application, including, naturally, the arguments of the opponents to the merger, and how the FPC itself cut corners to present El Paso with a merger approval December 23, 1959, and how El Paso was able to and did close the merger December 31.

All this for a $9 million tax advantage. And, Mr. Chairman, I cannot help contrasting this precipitous rush with the far slower pace of the principals when it got around to divestiture, 15 years later.

The order to divest became final in March 1973, when the Supreme Court rejected El Paso's appeal, but the divestiture did not come until February 7, 1974, 11 months later.

So I think the benefits of tax losses should be taken out of mergers and acquisitions which turn out to be illegal, I do not propose this for acquisitions otherwise unlawful, or mergers.

But I want to remove the possibility that the lure of another $9 million tax loss would push us into another illegal merger, another legal horror story like the *El Paso* case.

My second suggestion is this: I favor impounding the profits earned out of illegal acquisitions and mergers as the bill provides, and I think it should be made impossible for the lawbreaker to profit out of his violation of law.

Additionally, I have come to think it should be made impossible for the lawbreaker to finance his violation out of the profits that he reaps from his violation.

So long as a violation can be self-supporting, illegal mergers will continue to be viewed not as the unlawful acts they are, but as business propositions.

In my prepared statement, I tried to show how—in the *El Paso* case, again—El Paso's hold on the profits of the Northwest Division, which eventually were running between $10 million and $12 million a year; first, made El Paso—although it was the defendant and the adjudicated lawbreaker—the dominant figure in the courtroom; second, had some of the applicants, the world-be-acquirers of the assets to be divested, vying with one another for El Paso's favor; and third, enabled El Paso to commit enormous resources to its defense of the lawsuit and to its 5-year push for forgiveness legislation that would have let El Paso keep the Northwest Division. I cannot help but feel that if those profits had been set aside and El Paso had been able to draw only on its own resources for what it spent on this case—which, I would guess, must run into millions—another incentive for this illegal merger would have been lacking.

I have just one change to suggest, as my second suggestion. There may be cases in which it may be a clear inequity for the impounded profits to go to the divestee, if that is what the bill means and intends, although, as a general proposition. I favor that, too, as a desirable deterrent along with the ceiling on the divestiture price.

In the instance of a clear inequity, so found expressly by the trial court, I would suggest that the trial court be authorized to order the profits covered into the U.S. Treasury as miscellaneous receipts, as the only other alternative.

I have one other addition to the bill to suggest. It would go hand-in-hand with the provision already in the bill, that the cost of acquisition as determined by the trial court would be the ceiling price on a divestiture by sale.

The purpose behind this is to prevent the acquirer from profiting from divestiture. That being so, I think there ought to be a prohibition against the acquirer, in an illegal acquisition, having the advantage of claiming a loss for tax purposes if the divestiture price comes out to be less than the acquisition price. Hand-in-hand, these two provisions, like the rest of proposed section 23(g)—in fact, like the rest of title V—should assist in focusing attention of prospective acquirers and merger partners: one, on whether their proposal is lawful; and two, to relegate to the background consideration of the project solely in terms of whether it is an attractive business proposition.

This third suggestion—and I would hope all three—should provide additional deterrents to illegal acquisitions and mergers. In fact, I believe all of title V would. I favor it. And I thank you, Mr. Chairman.

Senator HART. Thank you very much for the specific suggestions you had. I think it would be more useful if Mr. Nash would direct the staff questioning because of the time problem.

Mr. NASH. Mr. Watkiss, I recall some years ago, staffing the El Paso forgiveness bill, the arguments made before the Commerce Committee at that time with respect to the harm that would befall the customers of El Paso Natural Gas Co. if divestiture was required.

Can you provide a perspective for the record with respect to whether we, in fact, wound up with two weak companies, or one strong and one weak company, and the effect of divestiture on the consumers in the Pacific Northwest area?

Mr. WATKISS. I didn't comment on that in the opening, because I understood from the chairman's remarks that my prepared statement would be on the record, and I had commented there on this point.

I, personally, have some pride and sense of satisfaction, as I would believe Mr. Dougherty would have to an even greater degree, in the result that I think we finally attained in the *El Paso* divestiture case.

The company that was created has been in business since February 1974. It is strong, it is viable, it is providing the type of responsible gas service that we knew it could provide.

And not only that; I think those that kept the faith, look on it with a great deal of satisfaction, because it is also actively involved in seeking new energy supply sources, developing new domestic supplies as well as foreign supplies and performing, I think, in an outstanding manner.

I have with me here today and I would be happy to tender to the committee an annual report[1] of what is now known as Northwest Energy Co., that I think describes some of its activities in the less than 2 years of its existence, and the strength and vibrancy that it has brought into the western energy market.

So I can happily answer your question by saying, I think, in this case, despite the long and anguished years, a very, very worthwhile result was obtained.

Mr. NASH. A number of commentators have noted that the Government puts all its effect into proving a violation of the antitrust laws, and then very little effort into the process of coming up with and seeing through an effective remedy.

In effect, they win the battle and lose the war in merger cases by not obtaining effective relief. Would you or Mr. Dougherty care to comment on that, based upon your *El Paso* case experience?

Mr. WATKISS. I would like to make a quick comment, before John does. I think it is probably more appropriate for him, but maybe he is in the position to say what I want to say.

During the time that John Dougherty was out trying this case all by himself—and this is the difficult divestiture phase, the remedial

[1] Retained in committee files.

phase, which is the crucial phase of an effective antitrust enforcement and, as you say, they have a number of lawyers who group together and go out and prove that the law was violated. But when it comes time to do something about it in the public interest, all those lawyers disappear, and one lone Government counsel goes out to contest this tremendously difficult battle.

Now, at the time he was doing that, I couldn't help but note that in Salt Lake City, we had a small, relatively unimportant and quite simple milk price-fixing conspiracy that the Justice Department was involved in. The San Francisco office could free-up, on a full-time basis, at least four or five lawyers that were spending their time in Salt Lake City on that relatively minor case, when they had this very important case that Justice could only free-up one lawyer for, and that following the criticism of the Supreme Court in Divestiture I where the Justice Department was castigated for "knuckling under" in failing to formulate a responsible divestiture plan.

I have never understood this, and maybe Mr. Dougherty could explain it to me.

Mr. DOUGHERTY. Well, I really hesitate to get into that area, Mr. Nash. I don't speak for the Department, and I don't make those judgments.

I did feel outgunned, outmaneuvered, outresearched, outargued, out the door. I didn't know about the milk case in Salt Lake City. If I had, I might have been able to use that situation as a means of getting more help.

I really hesitate to put myself in the position of second-guessing my superiors on a judgment like that. That is their function and not mine, and it is only made more difficult for me by the fact that if I come back to Washington and complain, I can't expect a favorable reception—no one can. They don't want to hear complaints. They want to see results, so I concentrated on getting results, as best I could.

Mr. NASH. In Mr. Watkiss' statement, it is mentioned that the cost and expense of divestiture, in your client endeavoring to obtain divestiture and be successful in its desire to acquire the divestee's assets cost several million dollars.

Are there any estimates available for this record, with respect to the cost of that proceeding to El Paso?

Mr. WATKISS. I think you directed that to John. The only place I have seen any estimate of the total cost that El Paso may have had, or expended, was in a book that is probably known better to you than it is to me in Salt Lake. It is entitled, "The Other Government."

In that book, it was reported that El Paso had spent at least $15 million during the 17-year battle or effort. We knew, during some of the congressional hearings up here, that there were reported sums that were spent in connection with the legislation and other efforts that they made that were set forth in their FPC filings.

I know that the applicants in the case—all of them—spent at least $250,000 in each divestiture. Colorado Interstate wrote off $2½ million in the efforts they made in the two divestitures.

My client, in just the last part of the last divestiture, and the final efforts we were involved in, which included some efforts up on the Hill, we spent primarily, in the trial, over $1 million.

The costs in matters of this kind are fantastic. It cost us over $2 million to structure the new company. Mr. Dougherty has pointed out that it took us nearly a year to do this, even after the Supreme Court had rejected the last appeal.

And when you are going to set up a company that is going to have $200 million in gross sales, going to have over a thousand employees, you have tremendous expenses, and this was some $2 million. Our printing bill alone, in setting up the new long-term debt, was some $700,000. El Paso spent an equivalent amount, even greater, for a similar printing requirement.

I have a couple of pictures that I brought with me today that might be of interest to the committee, which show some of the documentation that is required to set up the new long-term debt for a company of this size, and the many papers that we had to negotiate and sign, which took the many months Mr. Dougherty is talking about.

Senator HART. We would like that for the record.

Mr. WATKISS. I would be happy to present them.[1]

Mr. DOUGHERTY. May I inject there, Mr. Chairman? That table with the pile of papers which is shown in the picture was known to the parties as "The Buffet." [Pause.]

Could I say one thing, Mr. Nash, about your question?

Mr. NASH. Certainly.

Mr. DOUGHERTY. I believe you could get a partial idea of the expense to El Paso from the annual reports that El Paso filed with the FPC.

It is my understanding, for example, that those annual reports were the source of the information that El Paso had spent $893,000 in the effort to get its forgiveness legislation passed, in the year 1971 alone.

Now, I should caution you that there are only certain specific categories of expense called for, and that you will not find separate enumerations of the salary expense, office expense, and many other items of expense that would be connected with a particular effort, like the trial of this case or the push for legislation for which the company is required to report only certain given, specified expenditures, like legal fees.

Mr. NASH. Thank you, Mr. Chairman. I have no further questions.

Senator HART. Mr. Chumbris?

Mr. CHUMBRIS. Thank you, Mr. Chairman. We have a time problem, because we have a number of witnesses, so I have no questions to ask, but do point out that our silence doesn't mean that we agree with every point you have been raising.

You have made some points here on an issue which, because of your experience, you put it in a special category. But when we legislate, we have to legislate for all types of problems that might come within that particular law, and you have to keep that in mind.

So I have no questions—just to bring out that particular point, however.

Senator HART. Neither of us will be stopped if we elect to save time by saving questions. I take the same position.

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[1] Retained in committee files.

Gentlemen, thank you very much.

Mr. DOUGHERTY. May I just say one thing?

Senator HART. Yes, sir.

Mr. DOUGHERTY. Perhaps this will allay counsel. The proposals that I was advancing were not limited to the natural gas industry. They were proposals of general application.

Mr. CHUMBRIS. I understand that. That is why I made that point and emphasized my point.

Mr. WATKISS. We are only pointing out that we think the case we were involved in is a classic example of the problems of divestiture, and the problems that we encountered, we think you will encounter in most divestiture cases where you have substantial companies involved in complicated market conditions.

So the suggestions of both of us were, I think, mindful of what you are talking about and that is the reason I pointed out that I think you need to provide the district court with some discretion.

Senator HART. Gentlemen, thank you very much.

[The prepared statement of Mr. Dougherty follows. Testimony resumes on p. 440.]

PREPARED STATEMENT OF JOHN H. DOUGHERTY, RETIRED ATTORNEY, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, RE S. 1284

My name is John H. Dougherty. For twelve years I was a trial attorney in the Antitrust Division of the Department of Justice. I retired last December 31. I want to emphasize, even if it is unnecessary, that I do not speak for the Department—either as of now or as of the times of events in the past I may mention. And I want to speak only of matters of public record or public knowledge.

In my work, I represented the Government in a number of merger cases, for varying lengths of time in each. One was the Penn/Central case. I appeared in that case before the ICC in the interval between the first Supreme Court decision, which said the ICC had not supported its merger approval by proper findings, and the second, which upheld the ICC's merger authorization. I was trial attorney in the so-called Northern Lines case in which the Supreme Court eventually upheld the merger of the Burlington railroad, the Great Northern and the Northern Pacific into the consolidated company which is called the Burlington Northern today. I was in some bus acquisition cases, too.

But the case I spent the most time in was the El Paso antitrust case, which involved the acquisition by El Paso Natural Gas Company of its potential competitor, Pacific Northwest Pipeline Corporation, in 1957, and the merger of the two at the end of 1959. That case lasted for 17 years, from 1957 to the divestiture on February 7, 1974. I was the Government attorney employed in the trial of the case for the last 7 of those 17 years, and the only one during those seven years except for one time toward the end of the case when my superiors came out to Denver and we divided up the work for a week of trial between us.

For tenacity, persistence, and complexity, it is hard to beat the El Paso case. It enjoys the doubtful distinction of having been acted on by the Supreme Court eight times, four of them during my seven years.

Along the way, I began to sense need for some changes in the law. I came by the few ideas I want to put before you today the hard way, so to speak, on the firing line of antitrust enforcement. My ideas have to do with Title V of the bill.

If a premerger notification requirement like that proposed in Title V had been in effect in 1957, all concerned, not least El Paso but more importantly the public, would have been spared the endless ordeal of the El Paso case. There would have been no merger. I can say that with confidence because the Supreme Court, when it reached the merits of the merger in 1964, found in so many words that "If El Paso can absorb Pacific Northwest without violating section 7 of the Clayton Act, that section has no meaning in the natural gas field." 376 U.S. at p. 662. The case would have ended then, after just one trip through the Supreme Court instead of eight.

But by 1964 it had been nearly five years since El Paso and other parties involved, primarily the lenders, had consummated the merger on (or as of) December 31, 1959, in a precipitous closing on the heels of a go-ahead from the Federal

Power Commission. So the Supreme Court added an order for divestiture specifying that it be accomplished "without delay." Yet another ten years were to elapse before the divestiture became a reality, and a successor to the old Pacific Northwest emerged from it. And by then Pacific Northwest's merger with El Paso had unlawfully suppressed competition for 17 years. With a premerger notification requirement, the enormous violence thus inflicted for so long upon the public interest could all have been prevented.

Now the premerger notification requirement may not be enough to prevent a violation. Additionally the facts about the structure of an industry and the role of competition in that industry vary from industry to industry. Conceivably the data which would be forthcoming from respondents under the reporting regulations the bill authorizes or the further data they may supply on request may not be enough, whether by design or otherwise, for the FTC or Justice Department to decide, within the periods for notification and waiting which the bill would establish, whether to move to block the merger. I favor the ancillary remedial provisions the bill also provides in the event suit ultimately has to be brought against an acquisition or merger that has been consummated.

In particular, I favor the provision in the new section 23(g) of the Clayton Act for the court to order the acquiring company or defendant, to hold the acquired stock or assets separately, and to place the profits therefrom in escrow. This requirement would accompany the provision that the court is to determine the price at which the stock or assets were acquired; the provision that that price shall be the ceiling on what the defendant can realize in a divestiture by sale; and the provision that the impounded profits are to be transferred along with the stock or assets unlawfully acquired, presumably to the divestee. I have three small suggestions to make as additions to these provisions and not as substitutes for them. Additionally, some of these provisions may not fit a given situation. It should be possible to waive enforcement of them in that situation. I would suggest the bill authorize waiver if the trial court expressly finds that the provision is inapplicable or enforcement would be contrary to the findings and policy declared in Title I.

1. *Tax treatment of operating losses.*—I think the bill should prevent the acquired or acquiring companies in an illegal acquisition and the acquiring company in an illegal merger from taking advantage of any loss sustained in the operation of the acquired firm, stock, or assets, whether such losses occur in the period following the acquisition or merger or have occurred in the period prior thereto. This would be the other side of the profit-impoundment coin, so to speak. It could provide one more way of discouraging illegal mergers.

The *El Paso* case offers a good example. Pacific Northwest had accumulated $53 million in operating losses when the two companies merged at the end of 1959. Part of these losses were incurred prior to the stock acquisition in 1957, the remainder from 1957 through 1959. El Paso's Chairman testified in the antitrust case in Denver in 1968 tht the first $9 million of this $53 million tax deduction, which was of no use to Pacific Northwest because of its continuing loss position, would have been lost to El Paso too if El Paso had not been able to close the merger by the end of 1959.

It had taken until November 20, 1959 for El Paso's application to the FPC for merger approval to progress merely to the stage of an Examiner's decision, favoring merger. In the normal course, time-consuming procedures of exceptions by merger opponents, then replies by the proponents, then oral argument, and finally a decision by the full Commission, all would still lie ahead. That schedule would have extended well past December 31. Everyone worked to beat the December 31 deadline. The lenders' lawyers drew up in advance a new consolidated mortgage to secure the bonds of both companies, a massive printed document running to hundreds of pages.

It was premised on title passing as of December 31 and the lenders executed it early in December and stood by with El Paso on the ready, waiting for the go-ahead from the FPC. The alactrity of the lenders in 1959, incidentally, was missing 15 years later when they took many months to divide that same mortgage back into two for the divestiture. The FPC for its part hurried things along by telescoping its procedures: only 20 days for exceptions; oral argument December 10, the day exceptions were due; and a decision approving the merger on December 23, 1959—a remarkable performance, befitting the season, which left El Paso seven full days (exclusive of Christmas) within which to complete the merger closing by December 31, in time to claim the $9 million tax loss.

And with the indispensible cooperation so obligingly provided by the lenders and the FPC, El Paso did just that. At the absolute earliest, the 60 day period under the Natural Gas Act within which any of the merger opponents could appeal the Commission's December 23 merger approval would not even have started to run until the following January 22, also well past the December 31 deadline. No one waited for the appeals. They came after the time for them matured, well after December 31. At the merger closing, El Paso secured the $9 million tax credit, but the public, already the loser when Pacific Northwest's competition was first stifled in 1957, was to lose even more: Another 15 years of competition suppressed while the case dragged on through endless appeals and new trials.

Far more than anything else, consummation of the merger, in a rush for the sake of a $9 million tax advantage, created the complexity and protraction of the subsequent appeals and trials. Without merger the case could have been settled by sale of the Pacific Northwest stock when the Supreme Court ordered divestiture in 1964. Instead, the assets and affairs of the two companies became commingled, the inevitable result of a single management even though the properties were geographically separate. And new issues kept arising as each of the three successive plans of divestiture subsequently wound its way up and back through the courts. Indeed as time went on the fact that the court and parties had to deal with a long-since consummated merger continuously aggravated the job for all.

El Paso did not need merger in order to eliminate competition from Pacific Northwest; that had already been accomplished when El Paso bought out Pacific Northwest's stock in 1957. But El Paso is on record that it did need merger in 1959 to gain access to Pacific Northwest's tax losses. So it was the threat of losing $9 million of the $53 million tax credit unless there was an immediate merger that was responsible for the last minute scramble to push the merger through, that gave El Paso the opening to press everyone to hurry, and that created the public spectacle of the FPC turning flip-flops in the effort to oblige. With the amendment I am suggesting the lure of this kind of tax advantage will be gone from illegal mergers, and with it the mischief it can bring. I urge the committee to give my suggestion consideration.

2. *Impoundment of profits—a suggested amendment and a suggested clarification.*—I hope it is clear from my operating loss proposal and from what I have said about it that I favor the provision already in the bill that would impound profits earned out of an illegal acquisition or merger. It is sound public policy that the lawbreaker should not be permitted to profit from his violation of the law. I have gained the further feeling that the lawbreaker should not be allowed to finance his defense of his violation out of the profits he reaps out of his violation. In antitrust cases the profits can be so large they eliminate any incentive to forego the acquisition. And they provide financial ammunition of often heroic proportions for the fight to keep the stock or assets illegally acquired, even after an adjudication of unlawfulness.

After the initial lean years El Paso's Northwest Division—the old Pacific Northwest Pipeline Corporation properties—became an increasingly profitable operation, clearing net profits after taxes of $10 million a year or more. Someone in the case calculated that a $10 million a year profit came to more than $820,000 for a 30-day month, about $27,400 a day, and $19.02 a minute—all free and clear. With that kind of return from the unlawful acquisition it is useless to expect the violator to work up enthusiasm for correcting the violation, by divestiture or otherwise.

Indeed, I think the whole process of divestiture should be taken out of the hands of the defendant, where it is so often left expressly or by default. It is not realistic to expect that the defendant will conscientiously plan and execute an act of self-mutilation, or create a competitor who could challenge and might even destroy him. As far as possible divestiture should be governed by fixed rules so as to permit only a minimum of flexibility to the defendant and a minimum range of discretion on the part of the trial court. Impounding profits is one way, a small one, of accomplishing this result.

Impounding profits can have other beneficial consequences. El Paso often made the point that the cost of defending the antitrust suit was not being borne by its ratepayers but by its shareholders. As its shareholders include shareholders from Pacific Northwest as well as shareholders originally owning shares only in El Paso, El Paso, when making this point confirmed both that it was using profits gained from the merger for defense of the antitrust suit and the enormity of the war chest at its disposal.

Indeed one got the impression El Paso was in the courtroom not as an adjudicated lawbreaker; but rather as a benevolent presence resigned to complying as an act of noblesse oblige with an unfortunate mandate of a misguided Supreme Court, patiently tutorial with novices (like me) whom events had intruded into the case, kind to those in the case whom it favored, and stern with those it did not. Its size, its control of the property, and the dominion it exercised over the Northwest Division profits overawed other parties in the case, notably some of the applicants who vied with one another for El Paso's favor. For long trial sessions, when I would take my one room at the Albany Hotel in Denver, El Paso often took a whole corridor, moving in company officers, lawyers, geologists, engineers, and other experts, and office equipment down to a large xerox machine. Cross examining a witness for a purchaser whom El Paso did not favor, El Paso's attorneys would return to the very next court session with 100 xerox copies of the offending witness's exhibits, with corrections now penciled in by the El Paso experts. And the use El Paso could make of these profits was not limited to details of courtroom strategy. In an annual report to the FPC, El Paso disclosed that it spent $893,000 lobbying for its forgiveness legislation in the year 1971 alone.

So I favor impounding these profits. I think this provision and my suggestion about denying access to operating losses, should be absolute prohibitions. They will fail of their purpose if they are less. It should go without saying that I have no interest in and I do not wish to touch profits earned independently of the illegal acquisition or merger. I have no objection to the acquiring company using its own resources in defense of its actions.

I have only one change to suggest in this provision: There may be cases in which it may be a clear inequity for the impounded profits to go to the divestee, if that is what the bill means and intends, although as a general proposition I favor that too as a desirable deterrent along with the ceiling on the divestiture price. In the exceptional instance of a clear inequity, so found expressly by the trial court, I would suggest that the trial judge be authorized to order the profits covered into the United States Treasury as miscellaneous receipts, but with the discretion only to choose between the divestee or the Treasury as the recipient.

Finally, to me it is implicit in the provision for escrowing these profits that they are not to be dividended out. If anyone considers that the point is at all unclear it should be made explicit. The managements of firms that have engaged in illegal acquisitions or mergers should no longer be allowed to buy the allegiance of their shareholders, nor to hide behind them.

3. *Disallowance of loss sustained by the acquiring company in a divestiture or sale ordered by the antitrust court.*—I would like to see a provision in the bill prohibiting the acquiring company from claiming, for tax purposes, any loss it may be able to demonstrate it has incurred on the disposition of the acquired firm, stock, or assets, in a divestiture or sale ordered by the antitrust court as the remedy for an illegal acquisition or merger. Such a provision would be a logical companion to the provision in the bill fixing the court-determined cost of acquisition as the ceiling price on disposition. I believe there is some precedent for my suggestion: For ratemaking purposes the FPC disallows what it calls an "acquisition adjustment," the mark-up over book value the acquiring company may pay in an acquisition. Whether the rule works the other way, I do not know. Presumably the seller would have no interest in reducing his rate base by claiming such a loss.

Knowledge on the part of a would-be acquirer that he cannot reap a profit out of an illegal acquisition, and may even have to swallow a loss in its entirety, could be a healthy deterrent. Divestiture should not be permitted to be the occasion for the acquiring company to reap a profit. Today no law prohibits the acquiring company from making a profit out of divestiture if it can extract one out of the situation. And it can expect to do so if the property to be divested is attractive enough; as presumably it will have been to have engaged the interest of the acquiring company in the first instance. In the El Paso case, long after the Supreme Court had denied El Paso's final appeal El Paso still engaged in efforts to maximize what it would receive from the now unavoidable divestiture, with financial consultants and other experts employed for the occasion. The cost to El Paso more than funded itself out of the continuing earnings of the Northwest Division and the delay perpetuated El Paso's hold on the property that much longer.

I think my suggested amendment would close a gap in the law that should not be permitted to continue, and I urge the committee to give it consideration.

Senator HART. A distinguished lawyer from the firm of Wilmer, Cutler & Pickering is our next witness. I think Mr. Lerman appears today on behalf of the Business Roundtable.

If there is no objection, if you wish you may begin. I must get over to the floor for a live quorum just preliminary to that New Hampshire election contest. I should be back before you finish.

Mr. LERMAN. Thank you for your kind words, Mr. Chairman.

Certainly, I would like very much to have the opportunity to speak with you directly, particularly on the subject that I plan to focus on today; that is, the compulsory inquisitorial powers of the Department of Justice.

Senator HART. Well, then, let us take a recess.

[A short recess was taken.]

Senator HART. We will be in order.

STATEMENT OF ARNOLD M. LERMAN, ATTORNEY, ON BEHALF OF THE BUSINESS ROUNDTABLE

Mr. LERMAN. Thank you, Mr. Chairman, You have been most gracious.

Rather than summarize all of my prepared statement,[1] I would like to take the opportunity to speak to you principally about title II. This is the grant of compulsory power to inquire.

I really wish I had some simple way to communicate to you the depth of my own concern about that power. It is coercive. It is uncontrolled. It extends everywhere. And it touches every person. It incorporates all of the abuses that attach to grand jury powers, and it affords neither the protection of the grand jury nor the justification for the use of the grand jury process.

The title incorporates everything that was rejected after 7 years of deliberation leading to the passage of the Antitrust Civil Process Act, and then some.

And these propositions were rejected, I should add, because of deep concerns about intrusion upon individual rights, concerns about harassment and concerns about abuse.

I know of nothing in the short time since those deliberations that should lead us to conclude that those dangers are any less present today. Indeed, in light of our recent experiences, I would suggest to you that they are with us even more.

Now, those are conclusions. I would like to explain them.

Title II would authorize the Department to demand, by compulsion, any information that the Antitrust Division might find useful in connection with any matter before any administrative agency in the entire Government.

The Department may also demand any information relating, no matter how remotely, to any subject matter involved in any inquiry about a past, present, or future antitrust violation or any activity which may "lead to a violation"—whatever that means.

You will agree, I think, that there is little that cannot be asked.

If responses are not forthcoming, the Department can invoke contempt sanctions and it can put people in jail. The Department

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[1] See p. 451.

can demand that information of anyone, whether or not he is a person under investigation—anywhere in the country. It can pursue the inquiry by oral interrogation, under oath, in secret, or by demands for written answers to questions, or by subpenas for documents. It may even insist that a person obtain information from others.

The Department can use the information in civil proceedings, in criminal cases, in grand jury proceedings, or before agencies.

If a witness is generously invited to respond to a secret oral interrogation, I would ask you, Mr. Chairman, what can he do?

There is no impartial person present to protect against abuse or harassment. He does not know whether he is a potential civil or criminal defendant. In fact, he knows nothing at all—except, in the case of an antitrust inquiry, the vaguest description of the general subject matter of the inquiry.

If he is fortunate enough to have an attorney present, he may object to questions, but hardly upon grounds of relevance. The scope of the power granted is so broad and his knowledge is so sparse, that there is little to which that constraint of relevance would apply.

If he invokes a fifth amendment privilege, he may, nevertheless, be forced to respond by a grant of use immunity, a form of immunity, which, many claim leaves very little to the privilege against self-incrimination. He is, in short, under compulsion to reply, and he is largely at the mercy of the scruples or the sensitivity of his interrogators.

If the demand is a fishnet for documents, what constraints apply there? Again, relevance means precious little in this context.

I suppose that a request could be burdensome to the point of oppression. But if we have learned anything from grand jury subpenas, that constraint is so narrowly construed that it, too, means precious little. And while there is a theoretical right to raise claims of undue burden, neither the witness, nor the court in which he might raise that claim, will know enough about the subject ever to balance the burdens against the real need for the information.

These are a few illustrations, but I think they suffice. Do they not at least lead you to ask what personal intrusions title II would visit or how much it inflicts? Who will watch how the power in title II is going to be used? How far can it reach? And who will ever know? How can it be constrained? And why should we confer it on a prosecutor at all?

Please understand, my comments do not reflect on particular persons who now serve in the Department. Congressman McGregor put it well when he expressed the same concerns in rejecting similar proposals at the time the original Antitrust Civil Process Act was passed.

He said:

> I do not suggest that this Attorney General, or perhaps any Attorney General, or his assistants, would abuse this tremendous grant of authority, but I think we should concern ourselves with the possibilities of its abuse, rather than with the prospects and possibilities of its proper exercise.

Let me make just a few observations here.

First, these powers are very much like grand jury powers. The abuse of grand jury powers has gravely concerned many of us. I hope

you have the opportunity, Mr. Chairman, to read the remarks of your distinguished colleague, Senator Kennedy, in testifying about grand jury abuse.

You will find in that testimony, an explicit catalog of all the vices of title II. But title II is far worse. There is not even a grand jury present to stand between the prosecutor and the witness. And to the extent that we tolerate the threats of abuse of grand jury proceedings, we do that of a need to have a criminal process. The Department already has criminal grand jury process for antitrust violations, and I do not understand how we can possibly want to extend those grand jury techniques to civil regulatory laws.

Second, everything that you now consider in title II was explicitly rejected just 13 years ago when the Antitrust Civil Process Act passed.

In my prepared statement, I have detailed the legislative concerns that were expressed then. They are no different now. Our experience in the interim hardly suggests that we exercise less constraint upon uncontrolled powers of inquisition.

It was just a short time ago that we all read, with dismay, Mr. Dean's memorandum which spoke to the question of—and I quote—"How we can use the available Federal machinery to screw our political enemies," or Mr. Magruder's proposal—and these are his words—"To utilize the Antitrust Division to investigate various media relating to antitrust violations; even the possible threat of antitrust action, I think, would be effective in changing their views."

Bear in mind that Mr. Magruder was talking about a simple investigation and not the more excruciating pressures that title II would permit.

I know that these points are obvious, and yet they really do have to be raised again. When I see the provisions of title II, I think we very quickly have forgotten our earthy lessons, or perhaps we have not learned them at all.

Third, I have carefully reviewed the Assistant Attorney General's remarks in support of title II, precisely to determine what kind of special enforcement need could warrant the extraordinary power that is here proposed.

There are two reasons given: investigative efficiency for antitrust cases, and assistance in amassing information for the Department's role as protector of competition in administrative agency proceedings.

For reasons set forth in my statement, I do not believe that the Department's role before agencies warrants any special inquisitorial authority at all, nor do I believe that the Department views this as a serious basis for requiring title II.

As for efficiency, indeed, yes, I would readily agree that title II would contribute to efficiency. But how much do we really need it, and is it, in any event, worth the price?

Here I would ask you to pause for a moment and reflect upon the need. The Department already has grand jury process for criminal violations of law. It has an incredible array of other investigatory authority, including many other ways to reach information through compulsory processes.

It was a relatively short time ago that the Assistant Attorney General, then in charge of the Antitrust Division, explicitly stated that there were very few instances where it would be necessary to

have compulsory process to interrogate individuals, and that it was not in any way worth the intrusion.

It was just a short time ago that the Department expressed its view, that what was required was the civil investigative demand authority it now possesses under the act.

What then is really the depth of any enforcement need? I do not find any answer, let alone any convincing demonstration of need in the justifications that we have seen so far.

Finally, Mr. Chairman, I would hope that you cannot be persuaded that investigative efficiency, is, itself, a warrant for the proposals of title II, or that your expectations that the Department may use the extraordinary powers with discretion, will color your judgment.

We can have more investigative efficiency were we to abolish constraints against wiretapping or to revoke the fourth amendment prohibitions against unreasonable search and seizure. We do not choose to do so. The question is, to my mind, no different here.

I am reminded of Senator Kennedy's testimony on grand jury questions when he commented on the Organized Crime Control Act of 1970, and I would like to leave this subject with the thought that he expressed:

> In part, of course, Congress is to blame for the present crisis because Congress failed to recognize the sinister potential abuses lurking beneath the innocuous surface of the 1970 law. In part, the Department of Justice is to blame for lulling Congress not only with excessive protestations of the need for this new act as a law and order tool, but also with equally excessive and wholly unfulfilled promises of good behavior if only the act were passed. Today, in consequence, the investigative grand jury has become a powerful new agency of political oppression.

And, of course, our concern is not for political oppression alone.

I sincerely hope that we will not be making the same tragic observations because title II were permitted to become law.

Again, Senator Hart, I want to thank the committee for the opportunity to appear. As you know, our prepared statement covers many other portions of the bill, as well, and I would be happy to try to answer any questions you may have about the bill, itself.

Senator HART. Thank you, Mr. Lerman.

I understand better why you wanted to do it eye-to-eye rather than my reading the record, assuming I would read the record. You know perfectly well that you are appealing to what I hope are my good instincts, when you caution against doing something merely for the sake of efficiency if it would intrude on freedom. I want to be darn sure that the bill does not do that, or whatever comes out here does not do that——

Mr. CHUMBRIS. You can take our word for it, Mr. Chairman.

Senator HART. And as you have been counseling me, I was going through this title II again, and I am sure staff will develop it in greater precision, but in your prepared testimony—and I know this is not the principal concern that you addressed yourself to—you say, "The demand may also be made to elicit any information which the Department may wish to have in connection with any matter in any proceedings before any regulatory or administrative agency of the United States."

Mr. LERMAN. That should read, Senator, "The Antitrust Division may wish to have."

Senator HART. The Antitrust Division, yes. but if you look on page 3, lines 18 and 19 of the bill[1] which is part of the definition of the term "antitrust investigation," we say it means an inquiry conducted for the purpose of ascertaining whether somebody is, has been, or is about to engage in an antitrust violation. Where in the bill do you find the proposition that, having undertaken that kind of inquiry, the Department then may use it in an unrelated SEC action or something like that?

Mr. LERMAN. Senator, I was as surprised to find it in the bill as you were.

Senator HART. Where is it?

Mr. LERMAN. If you will look with me at pages 11 and 12 where it reads——

Senator HART. Down on line 23?[2]

Mr. LERMAN. Down on line 23, and there are two portions I would like to read to you.

The first one begins on line 23 and it says, "Whenever any attorney of the Antitrust Division of the Department of Justice has been designated to appear before any court, grand jury or Federal administrative or regulatory agency in any case or proceeding or to conduct any antitrust investigation," that he may then proceed to use these materials.

And now if you will look on line 17 on page 12, it says, "The Antitrust Division, while participating in any Federal administrative or regulatory agency proceeding, may employ the authority granted by this Act to obtain information or evidence for use in such proceeding."

Senator HART. You are dead right. I am not conceding that we are dead wrong in proposing it, but I did not know that we had it.

The concerns that you voiced, I do not pretend I remember hearing the same words, but I have the impression that about the same concerns were voiced, and I am sure, with equal concern, about 10 or 12 years ago, when we finally passed the existing Antitrust Civil Process Act.

Mr. LERMAN. Yes, indeed.

Senator HART. And I am not saying that you were here saying it, but——

Mr. LERMAN. I would have been happy to say them, were I here.

Senator HART. Has the experience in the intervening time established the accuracy of that kind of prediction about the Antitrust Civil Process Act?

Mr. LERMAN. Oh, Senator Hart, I misspoke with respect to your initial inquiry.

I think the same concerns that we are voicing today were voiced in connection with the legislation some 12 years ago. But those concerns were not voiced with respect to the civil investigative demand which is contained in the act today; they were voiced with respect to the other proposals that were then being considered. The concerns were reflected throughout that entire legislative history by comments that it was all right to proceed with the civil investigative demand precisely because the statute, as it then existed, and exists today, took care of the problems of intrusion, of personal invasion, secret interro-

[1] See p. 4 this hearing record.
[2] See pp. 12 and 13 this hearing record.

gation, and of everything else that I think we are, unfortunately, proposing now in title II.

Senator HART. Assuming, for a moment, that the section that you have just read in response to my question of where do you find the basis for saying that the Antitrust Division could use the results of its investigations other than in the antitrust action which might follow the investigation, was not a part of the bill. The bill has the following protections: The demand would not require production that would be privileged if under subpena, it would not require production if it would be unreasonable if sought by a subpena in connection with a grand jury; and, with respect to written interrogatories, it must not impose an undue or oppressive burden.

The conscious effort has been made to forestall the abuse. We have been told, I believe, by the courts, that the Antitrust Division cannot use the grand jury unless it is moving in a criminal, and not civil, investigation.

The authority really is not on all fours, but it is basically comparable to the authority that I think most Federal regulatory agencies have.

Is the real concern the fact that here it is hitched to the prosecutorial department of the Government?

Mr. LERMAN. Senator, I would like to divide your questions into two parts, and take the last one first.

One of the real concerns is that the power is hitched to the prosecutorial arm of the Government. But I think it far more than that.

Assuming that some of the regulatory arms of government have comparable power and that the exercise of that power may make some sense and is completely acceptable—and I would take issue in some situations there as well—but assuming that that is the case, first, there is a regulatory agency, a collegial body, interposed between the investigator and the witness; second, at least in theory, what is approved by way of investigation should be and frequently is highly specific, oriented to specific transactions, and the person questioned is far better advised of what is happening; third, at least in many regulatory agencies, the power of oral interrogation is not used; and fourth, the agency itself does not bring a criminal prosecution, it develops information for regulatory purposes.

We have, in the regulatory area at least, tried to develop an accommodation of the need for information for regulatory purposes with whatever private rights we seek to protect. There, we have drawn a line, a line that is a little closer to allowing the agency to obtain more and intrude more. To my knowledge, we never draw that line in the same way we look at a prosecutor and allow him to act on his own. Even in grand jury proceedings, the grand jury sits, in theory at least—and it sometimes does work in practice—as a constraint upon the prosecutor.

That is my response to your second question. My response to your first reference to the various forms of protection in the bill would be, in generic terms, that those protections are cast in the inadequate terms of typical grand jury protections.

When you use the word "unreasonable" in a grand jury subpena context, you are basically talking about the minimal protection of the fourth amendment against unreasonable search and seizure.

With respect to reasonableness and also with respect to questions of burden or oppression, the way in which you ideally treat those issues, if you are really trying to evaluate them, is to say: What is the specific information being asked; what is the entitlement to that information for the stated purpose; what is the real need, with specificity underlying the request. This is what you balance against what the objector must do. There is none of that approach here, absolutely none at all. I think the protection under title II is almost entirely illusory save for the grossest kinds of abuse where it does serve some real purpose of restraint.

Senator HART. Partly in reaction to your first answer which was to my second question—to get back to that—you reminded us that, at least in theory, the grand jury in criminal actions is a shield, perhaps not the equivalent of a regulatory agency commission, but it is there.

Would this be any less offensive to you, and I know others—the Business Roundtable is not alone in expressing this concern, although you have done it, I think most effectively. Others have.

Would it be any less offensive if we authorized the use of the grand jury to investigate antitrust violations even though criminal prosecutions were not required, or constitutionally, could you do that? I don't know.

Mr. LERMAN. Apart from the question whether you could or could not, I would certainly hope that we do not, because I think the entire grand jury process itself is under scrutiny. Rightfully so, since it is apparently not serving, even to the extent that we would hope, as a shield for the persons involved.

Senator HART. Perhaps in earlier hearings or in other committees, there has been filed for the record—I am sure you do not carry this in your head—the membership of the Roundtable. But I would appreciate it if for the record you would provide it.

Mr. LERMAN. I would be happy to furnish it.[1]

Senator HART. It is, I know, very impressive, but I would just like it for the record.

Mr. O'Leary?

Mr. O'LEARY. Mr. Lerman, would you favor repeal of the present Antitrust Civil Process Act of do you believe, with 13 years of experience, that the Congress was wise in enacting that statute?

Mr. LERMAN. My own personal view of that act is that it has served the Division well and that it has served the public well.

Mr. O'LEARY. There have not been any abuses that you can think of with respect to our experience under that particular statute?

Mr. LERMAN. Mr. O'Leary, I can't answer that question because I haven't been privy to the language of demands used and their purposes, except in those limited cases where some of the persons whom I represent have been unfortunate enough to receive demands.

Mr. O'LEARY. The Department seeks to, in effect, reverse the decision in *United States* v. *Union Oil*, to permit them to issue CID's prior to the act of merger.

Would you favor the extension of the existing law to that extent?

Mr. LERMAN. I really am glad you asked that, because if there is one area where I feel that any justification is made for the extension of the existing authority, I think this would be the area.

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[1] See p. 613.

On the other hand, if this is what the bill is trying to accomplish, it is done in a strange way that greatly expands the scope of title II, that is, by embracing "any activity which may lead to an antitrust violation." At least, I suppose this language is designed to catch proposed acquisitions. My observation would be that if you really want to take a civil investigative demand and extend it to a situation involving an acquisition where the statute does not now apply solely because of a court holding that the violation, so to speak, has not yet occurred, why not do so directly?

It can be done simply by saying that in cases of acquisitions or mergers the Civil Investigative Demand Statute would apply. That is a long windup for a short answer. The answer is: I certainly would not object to the extension of a civil investigative demand in the case of a specific proposed acquisition were the statute to read precisely that way.

Also, Mr. O'Leary, as you know, the same authority exists today in the FTC.

I don't see any reason in this particular instance where information is, in fact, exchanged to placing it in the hands of the Department of Justice as well.

Mr. O'LEARY. Looking at page 3, that language that concerns you, I assume, is lines 19 and 20: ". . . or in any activities which may lead to any antitrust violations."

Mr. LERMAN. I think that is very troublesome language all by itself, yes. I don't know what that means—I think an investigator armed with the authority to probe into that kind of conduct has available to him an excuse for probing into all kinds of areas without justification.

Mr. O'LEARY. When the prosecutor issues a grand jury subpena pursuant to rule 6 of the Federal Rules of Criminal Procedure, or whatever it is, and the defendant feels the Government has overreached, he may test whether or not the Government has overreached by moving before a district court judge with a motion to quash, may he not?

Mr. LERMAN. I think that is right, but that depends on what you mean by the term "overreached." Are you talking about a subpena in which you are addressing the question of whether the subpena is beyond the scope of the grand jury's authority or the question of burden—are those the kinds of issues you are talking about?

Mr. O'LEARY. Yes, or whether there is probable cause or reasonable grounds in the first place for the issuance of, say, a subpena duces tecum, a grand jury subpena.

Mr. LERMAN. I don't know what response to give to the "probable cause" question.

Mr. O'LEARY. I guess what I am suggesting, Mr. Lerman, is, under this statute, don't we end up with that same protection with respect to someone who would be the recipient of a CID, either for oral testimony or for documents—would he not end up before a district court judge saying, in effect, the Government does not have reason to believe that I am in possession of such documents or does not have reason to believe that I am in possession of information which may be relevant to an antitrust investigation, and I want to see what they have, you know, they are fishing.

Mr. LERMAN. Well, Mr. O'Leary, maybe the best way I can respond is to say that I suppose you could go to the district court and say, "I do not know why the Government believes I have any information that is relevant."

And I assume we are talking about a specific document request? All the Department would have to state, basically, is the very general nature of some kind of investigation and that is the point at which your rights stop.

The investigation may be cast in such broad terms and the power of inquiry rests on such a broad base, that to argue, that what you have may not relate in some way to the subject is extremely difficult. Bear in mind that this is very extreme language because it says that all you need have is something which relates to something which is a subject matter of an investigation. Now, let's put some flesh on those bones. We are going to investigate—let us pick one out—concentration in the diaper industry. You tell me what goes on in the diaper industry that would not conceivably be relevant in some way to the subject of that investigation.

Mr. O'LEARY. I am suggesting—and I guess you disagree—that you do have a right to test whether or not the Government has reason to believe or reasonable cause. There is a standard there and that you can test the sufficiency of the Government's evidence or information at that stage to see whether you have to produce.

Mr. LERMAN. I think our disagreement only relates to the use of the word "test." To the extent that you say you, in theory, may do it, I think you may raise questions in the district court. I am not really quarreling with that.

I guess my point really is that, in most instances, those objections are going to have very little substance because the scope of what may be inquired into is just so very broad and also because you have so very little information.

Mr. O'LEARY. Thank you. I have no further questions, Mr. Chairman. Mr. Nash may have some. I am not sure.

Senator HART. Mr. Nash?

Mr. CHUMBRIS. Before Mr. Nash starts, right on the point that Mr. O'Leary was discussing with you, isn't it a danger that needs to be protected, that once that person goes to court, the Justice Department official, even with his lawyer, may get to the point where he may not be sophisticated enough to understand the problems that may arise when he does make his move to the district court, it might be too late. He has already given up some of his basic constitutional rights.

Mr. LERMAN. I think that is quite true, and I also think that one of the real problems under the bill is the way it applies pressure even with respect to demands for written materials. It is intriguing to me that the bill says you must respond in 20 days from the date you receive the demand; and if you do not raise all of your objections at that time, you may waive them except if there is good cause.

Now, if you postulate that premise and a circumstance where someone gets served with one of these demands, he is in a state of semiterror, panic or just sheer consternation, he has a neat little 20-day period in which, in order to raise his objections, (a) he must raise them all; (b) he must decide what objections he has, and (c) if we are talking

about matters like file searches, he ostensibly must determine where his problems are. You have him at just the point in time when he has the most difficulty responding and you are pressuring him, just as all parts of this bill pressure people.

I have one other observation here. I am speaking about personal rights, because despite the public image that a corporation is somehow a monster that lives behind the scenes and the kind of authority that you are talking about in this bill is authority that is addressed to people, to the people who work for a company or to people who are officers of the company and to all kinds of other people, and it is people who are going to be compelled to respond.

Apart from the technical prerequisites of looking at standards that might be invoked for someone wholly equipped to defend himself, you really have to look at questions of interrogation from the standpoint of the way it pressures individuals who are placed in circumstances without real basic protection.

We are talking again about secret interrogation.

Mr. CHUMBRIS. Thank you.

Mr. NASH. Mr. Lerman, you have taken issue with some of the specifics of the bill I suppose in terms of its possible overbroadness.

On the other hand, you did agree with one of its major purposes, that is, to allow the Department of Justice, Antitrust Division, to investigate a merger or acquisition proposal before it is consummated.

Now, with respect to several of the other major purposes, do you believe, in principle, it is, or is not, appropriate to allow the Antitrust Division in the course of a civil antitrust investigation to take depositions or other forms of oral testimony?

Mr. LERMAN. Mr. Nash, my short answer to the question is that I would certainly prefer that that not be done. My reason does not so much relate to the propriety, if you will——

Senator HART. So much as to the what?

Mr. LERMAN. The propriety, if you will, but first depends upon whether you are talking about public or private depositions. If you are talking private depositions, I object vehemently because I think you are creating the same problems that your create under the basic bill itself.

You have an interrogator. You have a witness. And there is nothing between the two of them and the possibility of abuse. Now, if you are moving to the public area, I think my problems would relate to different types of concerns. I think you then have to consider whether that power can be abused in different ways like punishing people by the power of publicity outside of the customary judicial process or whether we nevertheless have intrusion harassment, invasion of fifth amendment rights or other risks.

And then you must start considering the kinds of protection that you feed into the process.

Ultimately, I would still raise the very basic question—is it worth the price? What is it that the Department of Justice really says it cannot do today. I have not heard the Assistant Attorney General say anything specific except in the merger area. I have not heard him really say that his ability to enforce these laws has been seriously hamstrung.

You know, if you look at the hearings during the deliberations leading to the original act itself, the showing made by the Department of Justice was impressive indeed. The Department came in with specific lists of investigations it had been compeled to drop because of its inability to obtain documents, and it said it had dropped them reluctantly and with great concern. I have not heard anything remotely resembling that in any of the testimony that I have heard so far. And if we are talking about those kinds of needs, I would still be concerned about where we draw the balance line on protection and whether the intrusion is justified.

In any event, we are not now talking about those kinds of needs, at least as far as I know.

Mr. NASH. In conducting an investigation of possible violations of the antitrust laws, do you believe it is more, or less, important to review documentary evidence than take testimony from an executive of a corporation responsible for overseeing the particular activity under investigation?

Mr. LERMAN. I would answer that in two different ways. Whether one is more important than another from the standpoint of conducting an investigation depends entirely on the kind of question you are looking at.

But personally, from my own experience, I suspect that it is the document production that would be more important in almost all cases.

I would also refer you again to what Assistant Attorney General Hasen said at the time Congress considered the original Antitrust Civil Process Act. He came before Congress and said, "There were just very few circumstances where we would want to use this power of oral interrogation, and it is not worth it." That is at least the judgment of one informed individual.

But even if I were to conclude, that the ability to question under oath is extremely important in many circumstances, I personally, again would only willingly tolerate it with all manner of protection that we do not remotely think about in title II and with the interposition of some independent judgment and discretion on the ability of the Department of Justice to act.

I think one-on-one interrogation can be a terrifying experience.

Mr. NASH. Do you support the principle of the bill which would allow the Antitrust Division to obtain documents from third parties?

Mr. LERMAN. My comment about the third party document production is whether or not that will, in fact, be used as an instrument of harassment and whether or not that, too, is necessary to the Department's authority.

I think we are getting to closer questions here. I basically find that objectionable as well, but I think it is a harder decision to reach.

Mr. NASH. I have no further questions, Mr. Chairman.

Senator HART. Mr. Chumbris?

Mr. CHUMBRIS. Thank you very much, Mr. Chairman.

Mr. Lerman, my only point is that you referred to the legislative history of CID from the time we started our hearings in 1958 through 1962 on the bill. And as you well stated and as the record shows, Senator Hruska, the ranking Republican on this subcommittee, was one of the moving forces in working out a compromise with Senators Kefauver, Dirkson, and Ervin, who were also very much in the

negotiations to see if there should be a bill, and to make sure all of these protections were in them.

And as a matter of fact, it was in the House where even greater protections were given to the individual rights. Then after the bill became law, Senator Hruska, as the ranking Republican, was asked in to introduce an amendment to the law. As the chairman well knows, the chairman was waiting on Senator Hruska to see if the bill would be introduced in the previous Congress, but it wasn't, because Senator Hruska felt that perhaps Congress went too far in 1962. But since it was a negotiated agreement between the Senators to come out with some kind of a bill, he did not want to go one step further. So when he was asked in this Congress to introduce the bill, and he turned it down; I know that he did it rather reluctantly. He is the ranking Republican on the Judiciary Committee, and he would have liked to accommodate the Justice Department and the Attorney General and the Assistant Attorney General. But after many conferences, he, in effect, said, no, I have gone so far, and I cannot see going a bit further in putting my name on the bill. He would not even put his name on the bill as introducing it by request, because there it might be an inference that somehow or another he gave some support to this bill.

That is how strongly Senator Hruska feels about it. He is not here today because there is a Judiciary Committee going on. But I am expressing it for him in the record.

Mr. LERMAN. Mr. Chumbris, I am truly gratified to hear that. And my own personal view is that Senator Hruska, by reason of his attitude and views, is doing a great public service about a very serious problem that I do not think people have focused upon enough.

Mr. CHUMBRIS. Thank you very much.

Thank you, Mr. Chairman.

Senator HART. Thank you very much for a presentation that I am sure will cause us to look once again at each line of title II.

Mr. LERMAN. Thank you, Senator Hart.

[The prepared statement of Mr. Arnold M. Lerman, on behalf of the Business Roundtable, follows. Testimony resumes on p. 465.]

PREPARED STATEMENT SUBMITTED FOR THE BUSINESS ROUNDTABLE BY ARNOLD M. LERMAN

Mr. Chairman and members of the subcommittee, my name is Arnold Lerman. I am an attorney and member of the firm of Wilmer, Cutler & Pickering. I am appearing today on behalf of the Business Roundtable. The Roundtable is an organization of approximately 160 leading business corporations. Its basic purpose is to provide a forum in which the business leadership of the nation can exchange ideas and develop policy recommendations on major business, economic and social issues. We very much appreciate the opportunity to testify on S. 1284.

S. 1284 is an omnibus bill. It covers a wide array of significant issues. I will resist the urge to address them all. I have tried to shape my comments to speak to some of the more significant issues hopefully in ways that may offer some fresh perspective or new materials.

I have selected three major Titles of the bill. Title II which deals with the amendments to the Antitrust Civil Process Act; Title IV which addresses the *parens patriae* authority; and Title V which deals with premerger notification and preliminary relief.

TITLE II—ANTITRUST CIVIL PROCESS ACT AMENDMENTS

Title II of the proposed "Antitrust Improvements Act of 1975" would amend the Antitrust Civil Process Act of 1962, P.L. 87–664, 15 U.S.C. §§ 1311–1314. Under the present statute the Department of Justice may serve a pre-complaint

civil investigative demand for documents upon any business entity for the purpose of determining whether the recipient is or was engaged in illegal activities under the antitrust laws. The present law permits the demand only upon companies under investigation, protects the confidentiality of the documents by forbidding transmission outside the Department, and limits use of the documents to cases arising from the investigation. Title II would extensively expand the authority of the Department to demand information and to use the fruits of its demands.

Let me illustrate the reach of the Title II amendments by describing the inquisitorial process proposed under the new bill.

Under the bill, the Department of Justice may compel a private person or business to produce documents, respond to interrogatories or give oral testimony. The demand may be addressed to any person whether or not he is the subject of an investigation. It may be made for the purpose of ascertaining any information which relates to any subject of any Department inquiry about a past, present or potential future antitrust violation or any activity which may lead to a violation. The demand may also be made to elicit any information which the Department may wish to have in connection with any matter in any proceedings before any regulatory or administrative agency of the United States. The Department may elect to use any information obtained in criminal or civil trials, before grand juries, or before a regulatory or administrative agency.

The oral examinations may be conducted in secret. If ordered to appear at a location other than his residence, the witness may be compelled to travel at his own expense. The examination will be under oath. There will be no hearing officer or other arbiter present to prevent overbearing or otherwise improper interrogation. It is not clear whether the witness has a right to suspend the examination to seek a court order protecting against abuse. The witness may, however, have counsel present.

In the case of an antitrust investigation, the witness will be advised of the nature of the investigation. In the case of an inquiry relating to regulatory and administrative agency proceedings, the witness need be advised of nothing. In either event, the witness has no right to know whether he is a potential criminal or civil defendant in any action, nor any additional substantive information at all.

The witness will be compelled to respond to the questions addressed to him. His responses must provide not only the information which he then knows, but information which he "may reasonably be able to secure." It is not clear whether this will entitle the Department to seek to use witnesses to obtain additional information for it.

The witness will be entitled to object to questions upon grounds of privilege or other lawful grounds. If the witness elects to invoke a privilege against self-incrimination, the privilege may be over-ridden by a grant of use immunity. Such immunity will not necessarily shield the witness from prosecution for transactions that may ultimately prove to be an issue in a criminal case.

The witness will not be entitled to a copy of the transcript of his own testimony either during or after the examination. He will not be entitled to copies of transcripts of testimony of others, even though those transcripts may be used against him in his own interrogation. Denial of access to transcripts may occur despite the fact that the Department may elect to use them in criminal or civil trials or before grand juries or agencies.

Demands may also be made for production of documents or responses to written interrogatories, The recipients of the demand will be required to furnish not only the documents or information in their possession, custody or control, but documents to which they may otherwise have a "reasonable access" and information which they may otherwise "reasonably be able to secure." Here again, it is not clear the extent to which the Department may use recipients as a vehicle for obtaining documents and information from others.

The recipient of a demand for written materials may raise objections to the demand. The basic objections available are those which may be raised in the face of grand jury subpoena. To raise an objection, the recipient must file a civil action in the district court within 20 days. Any objections which the recipient fails to raise within the 20-day period may be waived.

The judicial review available to a recipient or to a witness is extremely narrow in scope. As a practical matter, standards of relevancy and materiality do not apply because the breadth of authority for permissible inquiry is so broad and the inquiry so vaguely defined there is no basis against which such standards may work. This fact and the lack of information with respect to the justification for the inquiry also precludes the court from any practical measurement of undue

burden against need. In general terms, judicial review will principally serve to guaranty only that bare constitutional protections will be followed.

Title II would lodge in the Department an extra-ordinary degree of power. I will let the description of the inquisitorial process speak for itself. However, I would raise with you three questions:

1. Can you conceive of any subject which could not be inquired into under this bill?
2. Can you conceive of any person whom the power of inquisition might not touch?
3. Can you conceive of any realistic way to oversee what the Department may in fact be doing, or to protect against abuses either of the process or of the persons whom the inquisition may affect?

As you evaluate these questions, you may wonder why this marvelous engine of investigation is being proposed at all or why those concerns which prompted deliberate and careful limitations in the 1962 Act are not equally valid today. Indeed, you may inquire whether we are not, in fact, being asked to arm our prosecutors with weapons that create jeopardy to ourselves and our society. These are the subjects to which I now turn.

Over a period of seven years leading up to 1962, previous Congresses gave exhaustive consideration to enactment of the Antitrust Civil Process Act. Numerous bills were submitted, hearings were held, statements were received, and reports were prepared.[1] Extensive floor debates and amendments occurred, in both houses.[2] The operative bills were managed by two respected members of Congress in the antitrust field, Senator Kefauver and Congressman Celler. The result was a carefully drawn, fully considered Act.

In light of this recent and intensive Congressional scrutiny, it is relevant to ask why there is presently before this Subcommittee a proposal to revise the Act for the purpose of enlarging the Department of Justice's investigative powers. The case for enlargement has been put by the Department of Justice itself in its testimony in connection with Title II. In the Department's view, the amendments are needed for two reasons: to increase the "investigative effectiveness" of the Department in conducting civil antitrust investigations, and to assist the Department when it appears before federal regulatory agencies as an advocate for competitive policies.

Antitrust cases can be complex and collection of information is a task of considerable magnitude. I do not for one moment question the Department's view that the authority to demand responses to interrogatories and compel oral testimony or the production of information from individuals may be a useful investigatory tool that enhances the Department's enforcement capability. The real issue, however, is to determine the genuine depth of that enforcement need so that it may be balanced against the social costs of new authority sought.

Here, from the vantage point of a private citizen, the external facts suggest that the new powers are hardly essential. The catalogue of resources which the Department can muster to meet its tasks appears literally awesome. There is a whole world of public data, access to vast banks of information contained in the Departments, Bureaus and Agencies throughout the entire government, information offered by complainants or numerous volunteers, and information from others which the Department may actively seek out through its own personnel or that of the Federal Bureau of Investigation. Compulsory process is available not only directly through the grand jury proceeding or civil investigative demand, but also through the process and data gathering capabilities of regulatory agencies and other government bodies. It is available as well when the Department participates in judicial or regulatory proceedings.

Nor did the new powers appear essential to the Department just 13 years ago when the Antitrust Civil Process Act was passed. In the hearings that led to the passage of the Act, the Department's position was quite clear. It was the absence

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[1] *See, e.g.*, H.R. 7309, 84th Cong., S. 3425, 84th Cong.; S. 212, 85th Cong.; H.R. 4792, 86th Cong.; S. 716, 86th Cong. (passed Senate July 29, 1959); S. 1003, 86th Cong.; H.R. 6689, 87th Cong.; S. 167, 87th Cong. (became P.L. 87-664, September 19, 1962). *See* Hearings on S. 716 and S. 1003 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess. (1959); Hearings on S. 167 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. (1961); Hearings on H.R. 6689 Before the Antitrust Subcommittee of the House Comm. on the Judiciary, 87th Cong., 1st Sess. (1961). *See* S. Rep. No. 451, 86th Cong., 1st Sess. (1959); S. Rep. No. 1090, 87th Cong., 1st Sess. (1961); H.R. Rep. No. 1386, 87th Cong., 2d Sess. (1962); Conf. Rep. No. 1884, 87th Cong., 2d Sess. (1962); Conf. Rep. No. 2291, 87th Cong., 2d Sess. (1962).

[2] *See, e.g.*, 105 Cong. Rec. 14608 *et seq.* (1959); 107 Cong. Rec. 20659-62 (1961); 108 Cong. Rec. 3995 *et seq.*, 4566, 13985 *et seq.*, 18407-08, 18849 (1962).

of authority to demand documents in civil antitrust investigations which seriously affected the Department's ability to enforce the law and the Antitrust Civil Process Act responded to this need.

We must, of course, respect the Department's own appraisal of the adequacy of its investigatory tools for the mission it performs. The Department has testified that the limited scope of the Antitrust Civil Process Act "substantially impairs" its "investigative effectiveness." But I am not quite sure whether this testimony means that the absence of Title II powers is seriously undermining effective antitrust enforcement itself. In any event, the Department has not yet told us how except in the broadest generality. Yet it alone is privy to its internal problems and it alone has the capability of addressing in detail, as it did in 1962,[3] the precise ways in which antitrust enforcement may suffer from the absence of the power it would like to obtain.

On the other hand, the Department's testimony may mean simply that it will be able to proceed with much greater efficiency were Title II enacted. That is quite true. It is equally true that investigative efficiency is a worthwhile goal. But, apart from any question about whether that goal is in fact thwarted under today's laws, it cannot be the only goal under our system of government. We could, if we desired, maximize "investigative effectiveness" by permitting unlimited wiretapping, or abolishing testimonial privileges, or rescinding the Fourth Amendment, or abolishing Congressional oversight of the activities of the Department of Justice. We have not done so, for obvious reasons. Nor can we endorse Title II for the sake of prosecutorial efficiency with blindness to the damage that might be done.

The Department has also attempted to justify Title II by contending that it would be "advantageous" to the Department to have the proposed amendments to assist it in performing its mission as "one of the prime advocates of competition policy before federal regulatory agencies."[4] Title II does in fact authorize the Department to use its inquisitorial powers in aid of administrative agency proceedings throughout the government. That authorization cannot be taken lightly. Standing alone, it provides for whole new areas of subject matter into which compulsory investigative process may reach.

The Department's role and the new authority raise significant questions. Is the Antitrust Division, historically a prosecutor, the appropriate entity to oversee the policies of other federal agencies? How does such a role alter the Department's traditional status as the government's lawyer for such agencies? In any event, should the Department have independent investigatory authority for the performance of this role? Will its use of existing or new compulsory inquisitorial power affect the agencies' own proceedings and their ability to treat evenly all who appear before them? Whatever the response to those questions, one basic issue will always remain. Is there any need so compelling to the Department's competitive policy advocacy role to warrant authorization or use of the type of inquisitorial power set forth in Title II? The Department itself provided the obvious answer when it acknowledged that it would "undoubtedly not use this authority in many agency proceedings."[5] In short, while it may be true that Title II would be "advantageous" to the Department as a policy advocate before agencies, it is quite clear that the advantage is not worth the price.

There is indeed a dangerous price we pay and it is time to address that issue here. Throughout the proceedings leading to enactment of the Antitrust Civil Process Act, concerns were expressed about the dangers of granting the Department of Justice excessive investigative powers beyond those already available via the grand jury, the Federal Rules of Civil Procedure, and other mechanisms. Careful steps were taken to give the Department what was thought necessary yet to eliminate those dangers. There is nothing in our experience in the intervening 13 years to indicate that the dangers now are any less than they were then.

A major impetus for the Antitrust Civil Process Act came 20 years ago in the Report of the Attorney General's National Committee to Study the Antitrust Laws. The Report recommended creation of a precomplaint civil discovery process for use where civil proceedings are initially contemplated and voluntary cooperation is not forthcoming.[6] Its recommendations bore a striking resemblance to the

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[3] Senate Subcomm. Hearings on S. 167, *supra*, at 55-66; House Subcomm. Hearings on H.R. 6689, *supra*, at 17-28.
[4] Testimony of Assistant Attorney General Kauper, *supra*, at pp. 9-10.
[5] Testimony of Assistant Attorney General Kauper, *supra*, at p. 10.
[6] Report of Attorney General's National Committee to Study the Antitrust Laws, 315 (1955).

Act ultimately enacted in 1962. While the Report espoused, successfully, the enactment of a civil investigative demand authority,[7] it emphasized the safeguards that should be built into such an authority.

For example, the Report recommended legislation applicable only to relevant documents (not private persons) and then only to documents possessed by parties under investigation.[8] It further specified that the documents must "be relevant to particular antitrust offenses stated to be under investigation." [9] The documents were to be available *only* to the Antitrust Division and the Federal Trade Commission, not to anyone else.[10] And, in a passage of peculiar import to Title II, the Report stated:

"We reject the proposal for legislation authorizing the Department of Justice to issue the type of administrative subpoena typically employed by regulatory agencies. Unlike the Federal Trade Commission, for example, the Department of Justice is entrusted only with law enforcement. The grant of subpoena powers suggests broader regulatory powers, structural reorganization, a system of hearing officers and a panoply of administrative procedural protections which the Committee is not prepared to recommend. *We would, in addition, disapprove any subpoena power that would permit prosecuting officers in antitrust investigations to summon sworn oral testimony by placing businessmen under oath in the absence of a hearing officer and like safeguards. Such authority is alien to our legal traditions, readily susceptible to grave abuse and, moreover, seems unnecessary.*[11]

The concerns expressed in the 1955 Report about the needs for appropriate safeguards in lodging inquisitorial powers in prosecutors [12] surfaced repeatedly in the legislative process leading up to the Antitrust Civil Process Act.

For example, in the debates on the Act, Congressman McCulloch declared: "The grant of a civil process to the Attorney General does not mean . . . that he shall now be permitted to engage in fishing expeditions. Far from it. The fact that the Attorney General is the chief prosecuting officer of the Federal Government and the fact that an untrammeled right to obtain information could severely harm the rights of the individual have led the Committee on the Judiciary to strictly circumscribe the extent to which [CIDs] may be used." 108 Cong. Rec. 3999 (1962).

Congressman Celler, floor manager of legislation in the House of Representatives, emphasized the same point and also made clear that Congressional concern for unacceptable intrusions extended to business entities, not solely private persons.[13] And, many other members of Congress similarly referred to the need to structure the statute to avoid the possibilities of unacceptable intrusions or undue burdens.[14]

Congressional concern in 1962 about the dangers of lodging excessive powers in the Department of Justice did not reflect a mistrust of those holding office in the Department. Now, of course, are there grounds to fear the motives and actions of those holding office today. But the potential for abuse does not relate to individuals: it relates to the laws within which they operate. As Congressman

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[7] *Id.* at 346.

[8] *Ibid.*

[9] *Ibid.*

[10] *Ibid.*

[11] *Id.* at 345–46 (emphasis added; footnote omitted).

[12] Even with the limitations built into the recommendations of the Attorney General's Committee, one member of the Committee was unable to accept the notion of granting the Department of Justice—as distinct from the courts—the equivalent of a subpoena power. In his words: "One of the plainest lessons taught by the history of Government in any place and at any time is that freedom of the individual disappears with the growth of executive power." *Id.* at 348.

[13] "There is every appropriate safeguard in this bill to protect the citizenry." *Id.* at 3998.

"The bill, as amended, provides every conceivable safeguard for the company to which a civil investigative demand is addressed."

[14] In introducing a predecessor bill (S. 716, 86th Cong.), Senator Kefauver, who managed the legislation in the Senate, noted that it "protects the public against an unreasonable demand . . ." and "safeguards the confidentiality of the documents furnished. . . ." 105 Cong. Rec. 1876 (1959). Senator Carroll declared that "in the bill we tried to provide every safeguard," *Id.* at 14615. Congressmen Rogers, Lindsay, Patman, and MacGregor, in addition to McCulloch and Celler, repeated this point. 108 Cong. Rec. 3995–4004 (1962). The sentiments were reflected in the reports as well. As the Senate Report indicates; "The rights of those who produce documents pursuant to such demands and the preservation of their material are fully protected by the provisions of the bill and the enforcement of those rights is assured through proper court action." S. Rep. No. 1090, *supra*, at 9.

See also H.R. Rep. No. 1386, *supra* at 5 (many safeguards). After reviewing that legislative history, one court observed; "the tremendous concern shared by the committees, and others concerned with the bill, that it be surrounded by adequate safeguards and proper limitations on its scope. A real fear was expressed as to the danger of improper use of investigative power. These fears were manifested in the many protective provisions put into the act at various stages." *United States v. Union Oil Co. of California*, 313 F. 2d 29, 35 (9th Cir. 1965) (footnotes omitted).

MacGregor put it in explaining why limitations on the Department were an integral part of the Antitrust Civil Process Act: "I do not suggest that this Attorney General or, perhaps, any Attorney General or his assistants would abuse this tremendous grant of authority but I think we should concern ourselves with the possibilities of its abuse rather than with the prospects and possibilities of its proper exercise." 108 Cong. Rec. 4004 (1962).

In response to the concerns outlined above—such as protection of citizens and companies from unwarranted intrusions and burdens, protection of documents from unwarranted circulation not required by the Department's traditional enforcement powers, and guarantee of ready and fully access to judicial review—the Congress insisted on precisely those limitations that Title II would now discard. Perhaps the most import was treatment of private citizens, who were in Congressman Celler's words "carefully excluded". 108 Cong. Rec. 13986. It was an exclusion which the Department of Justice itself specifically endorsed.[15]

Other limitations considered fundamental to the 1962 Act were implemented as a result of the so-called Dirksen and MacGregor amendments. The former forbids the Department from turning over documents produced by CIDs even to Congress. *See* 105 Cong. Rec. 14608 *et seq.* (1959). The latter permits the Department to use CIDs solely against business entities "under investigation" and not against those entities "who were not themselves suspected of any antitrust violations." 108 Cong. Rec. 4004–09, 18408 (1962). As to the MacGregor amendment, Senator Hruska declared:

"Otherwise, there would have been vested in the Department of Justice a power to ramble virtually at will into the confidential records of any business corporation. That would not have served the purpose for which the bill is designed." 108 Cong. Rec. 18849.

As to both the Dirksen and MacGregor amendments, Congressman MacGregor stated:

"The power which would have been granted by [the bill in the absence of the two amendments] would not properly safeguard the innocent third party witness from bureaucratic harassment; books and records could have been demanded from anybody and everybody in business, and the Justice Department could have distributed the information obtained indiscriminately throughout various Government agencies. The basic individual rights to privacy and to protection against unreasonable search and seizure would have been trampled." 108 Cong. Rec. 18408 (1962).

These and other limitations [16] were inserted in the 1962 Act to insure that the Department was granted a tool but not a weapon. They were carefully drawn by men of foresight who acted before the lessons of Watergate taught us that if the potential for abuse exists, it can ultimately be fulfilled. One has only to think of the 1969 memorandum from Mr. Magruder to Mr. Haldeman urging use of the Antitrust Division and threats of antitrust actions to change the views of the news media or of John Dean's memorandum on the use of federal machinery to deal with political enemies to realize that the concerns underlying the deliberate balancing in the 1962 Act are justified.

It is no answer to these obvious concerns to say that some federal agencies have similar powers or that some States have given pre-complaint, antitrust investigative powers to their attorneys general. Similar arguments were considered by Congress in 1962; they did not lead to a rejection of safeguards then. They should not today. It is one thing to permit extensive investigatory powers to agencies whose delegated function is to determine policy and to make law by drafting regulations to flesh out the particulars of broad Congressional grants of authority. It is quite another to grant such powers to a Department whose appropriate role is to prosecute violations of existing law.

The analogy to the powers of grand juries, which appears to be the central theme of Title II, is equally inapt. Sweeping inquisitorial powers are granted to grand juries to assist them in determining whether there is probable cause to

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[15] In hearings on a predecessor bill of the 1962 Act, Senator Kefauver asked then Assistant Attorney General Hansen why the Department had not sought the inclusion of private citizens. Judge Hansen replied:

"We have had very few instances where we have need for such powers where individuals were included, and, frankly, we felt that it might be burdensome to an individual and that the need was not so great that we ought to place that burden on the individual."

Hearings on S. 716 and S. 1003 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess. (1959).

[16] *See* the statements of Congressmen Celler and McCulloch listing the specific limitations. 108 Cong. Rec. 3998–3999, 13986 (1962).

believe that the laws have been violated. To that extent grand juries and the Department share a common purpose—enforcement of the law. But an equally important reason for the powers of grand juries is to permit them to perform their historic role as "a protector of citizens against arbitrary and oppressive governmental action." *United States v. Calandra*, 414 U.S. 338, 343 (1974). Title II would grant prosecutors the powers of a grand jury without at the same time establishing the checks on potential prosecutorial excesses that the existence of an independent grand jury is supposed to guarantee.[17] It is particularly ironic that possible misuse of grand juries constituted one of the major reasons for enactment of the 1962 Act,[18] yet Title II would give to the Antitrust Division essentially all of the powers of a grand jury.

No reason exists today for rejecting the limitations contained in the 1962 Act. Even if some modifications in the existing law are in order, Title II is hardly an appropriate response. A prosecutor's desire for inquisitorial powers often clashes with a citizen's rights against intrusion. Our society's traditional approach to this conflict is to strike an acceptable balance, as by permitting electronic surveillance but stringently limiting its use or as by enacting legislation such as the Antitrust Civil Process Act. The scales in such a balance normally are weighted in favor of the citizen. But not in Title II. Title II represents a relentless promotion of the interests of prosecutors, to the disregard and jeopardy of everyone else.

An appendix containing additional comments with respect to Title II is attached following the discussion of Title V.

TITLE IV—PARENS PATRIAE

The *parens patriae* provisions of Title IV of the bill have been the subject of comprehensive testimony already, both before this Subcommittee in May, and in the House in connection with H.R. 38. I do not intend to cover the same ground in the same detail. My purpose, instead, is to try to put these provisions in perspective.

Much of the difficulty—and the frustration—in dealing with Title IV arises from a confusion of goals. When the *parens patriae* concept was initially proposed, I understood that its basic purpose was to make it possible to redress antitrust injury in those cases where the consumer plaintiffs number in the thousands or more and the individual claims are small in amount. It was (and is now) claimed that appropriate relief is not available because of "procedural" obstacles faced by plaintiffs. I would quite agree that if our goal is genuinely to compensate for injury, we should test any delivery system by a pragmatic test of its utility to injured persons. We must also test it, however, by the extent to which it in fact calls for compensation to be paid by a wrongdoer to injured persons and by its social costs.

On the other hand, in view of the actual provisions as proposed here, it may well be naive to pretend that their objective is solely or even primarily a system of compensation. The proposals clearly reflect an impatience with antitrust violations and a desire to attach greater penalty to their incidence. Funds will be paid not as compensation to persons injured, but to the state which will itself determine the distribution of those funds much as it determined distribution of funds from its general treasury. It is true that, under the Title, some funds may ultimately find their way into the hands of members of the public; but that is neither essential to the recovery nor relevant to the "damages" actually paid. Equally irrelevant is the question of whether a defendant pays the damages to persons who are actually injured.

When society reequires payments without regard to proof of actual injury and those payments are sought by and redound to the benefit of the state, we are in fact dealing with a system of social penalties. Perhaps by calling them "damages" we mean that there may be a new way to measure the penalty. But I do think that in this event we should stop the charade, recognize the system as a penalty system, and evaluate the penalties by the very different set of standards that we apply in assessing the propriety of those monetary sanctions that the state seeks to impose whether for vindication, deterrence, or other purpose, in its own right on behalf of society.

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[17] It is widely believed today that grand juries have ceased acting as checks on prosecutors and that prosecutors have converted them from shields to weapons. This has prompted Congressional concern. *See, e.g.*, Hearings on H. Res. 220, *et al.*, Before Subcomm. No. 1 of the House Comm. on the Judiciary, 93d Cong., 1st Sess. (1973). It represents yet another reason why the reliance in Title II on the model of the grand jury is unsound.

[18] *See, e.g.*, 105 Cong. Rec. 14613 (1959) (Senator Kefauver); 108 Cong. Rec. 3997 (1962) (Congressman Celler).

The testimony that follows may be summarized by four basic propositions. First, I am not at all persuaded that class actions under Rule 23 have ceased to be a viable vehicle offering compensation to consumers who are injured by antitrust violations and thereby also achieving a measure of deterrence in support of antitrust enforcement. Second, even if the class action is not available as a remedy in all cases, I regard it as far superior to Title IV if it is tested by standards of its delivery of actual damages directly to persons injured. Third, I view the goals of Title IV more as a penalty than as an effort to redress individual injury. And fourth, when Title IV is tested by rational standards which one would apply to a penalty system, I believe it is sorely wanting.

Under present law, an injured person may in fact seek compensation for damages from an antitrust violation. Where the claim is small, the cost and difficulty of suit may preclude an individual action. For this reason, class actions under Rule 23 have in fact been pursued as a vehicle for recovering damages in cases involving relatively small claims by large numbers of individuals. There are two requirements under Rule 23 which have created some impediment to those actions. First, if a person seeks to bring suit on behalf of a class, he has an obligation to notify the members of the class and, in fact, to use forms of individual notice if possible, This imposes a cost burden which the prospective plaintiffs must initially meet and ultimately bear in the event they lose. Second, massive litigation does create substantial problems of judicial management and courts have sometimes dismissed actions where they are viewed as "unmanageable" within the judicial framework.

I do not agree, however, with those who claim that the notice and manageability requirements destroy the viability of the class action as a remedy for injured consumers in antitrust cases. Those who would sound the death knell of the action point with alarm to the recent decision of the Supreme Court in *Eisen v. Carlisle and Jacquelin.*[19] The Court there held that class plaintiffs must pay for individual notices to all class members who can be identified. It may well be that the cost of notice presented insuperable problems in the *Eisen* case as it was then structured. But as Justice Douglas' dissent indicates, that problem—and problems of manageability as well—could have been avoided if the case had been brought initially on behalf of a manageable subclass consisting of fewer than six million members.[20]

Some cases may, of course, remain in which the cost of notice creates a substantial obstacle. But if the desire is to address state resources to this problem, it is difficult if not impossible to conclude that this cannot be done today. Where the state itself has been injured—for example as a purchaser—in the same way as consumers—it is clear that it may properly serve as a class representative for itself and the citizens of the state who have sustained similar injuries. Beyond this, the courts may also make it clear that the state may do so even where it was not itself injured, although there are probably few violations that cause monetary damage to individual consumers that do not also injure a state's functions in some manner. But, in any event, given a legitimate state interest, why is the state not able today without Title IV to make resources available in appropriate cases where claims are brought for the benefit of residents of the state?

This still leaves, of course, problems of manageability. Here, I think it is relevant to ask the question why. Obviously, one of the major difficulties—already discussed in detail by witnesses before this Committee—is the basic premise that a plaintiff who seeks to be compensated show the damages he suffered as the result of an antitrust violation. Where plaintiffs' attorneys have sought to structure classes that are too large, the courts have simply rebelled: not solely because of Rule 23 but, I suspect, at least in part because of the belief that courts are unable to deal with the adjudication of millions of claims. The answer may lie elsewhere as well. The judicial system may not be an appropriate vehicle for dealing with certain types of claims whether by reason of limited facilities, other demands, the inappropriateness of the case as a vehicle for compensation, or perhaps even a considered judgment of a cost benefit ratio in terms of the social values involved. Some might call it judicial reluctance—others judicial wisdom. But in any event the rule of manageability is far from absolute. All of us have much to learn about where the future boundaries may or should in fact be drawn.

I have dwelt this much upon the present circumstances because it is important to identify precisely the nature of the problems to which Title IV is ostensibly

[19] 417 U.S. 156 (1974).
[20] 417 U.S. at 178–186.

addressed. If we apply a pragmatic test to class actions, we can agree that there have been some cases where the class action device may not have worked to provide compensation for injury to consumers. There may always be some such cases. But judicial construction of Rule 23 has been gradually evolving and the question is one of degree. We are, I believe a long distance from the conclusion as a general proposition that the class action remedies are not meaningful and viable to compensate consumers in appropriate cases where the judicial system can usefully serve.

Whatever the scope of the problem, Title IV addresses it in a unique way. It would authorize states to sue in federal courts to recover damages sustained by persons residing in the state. The state will act either in a *parens patriae* status or as a class representative. Damages will be addressed in two steps: an aggregate amount will be estimated for everyone in the state and this is the amount that a defendant will pay; payment will then be distributed either in accordance with state law or in the court's discretion. The recoverable damages will include not only those that represent the sum of the theoretical injury to each resident, but also any additional "nonduplicative" damages to the general economy of the state.

To the extent that Title IV authorizes a state suing for damages on its own behalf as a purchaser to act also as a class representative for consumers, it confirms existing law.[21] To the extent that it authorizes the sate to act as a class representative when it is not seeking damages in its own behalf, the Title may settle ambiguity under existing law, but would leave Rule 23 intact.[22] Beyond this, however, Title IV would create serious difficulties. In its operation it would perpetuate and in fact aggravate existing difficulties faced by the judiciary in the resolution of claims for compensation. In its conception, it is at war with the standards by which both compensatory remedy and penalty systems should be judged.

No matter how the Title IV action is structured, it must always raise the question of the extent to which the adjudication in the state suit will bind the defendant and individual persons. Unless parties are to be bound by the action, every defendant will be subject not only to multiple recovery of triple damages but, at the very least, to demands of multiple lawsuits on behalf of the same persons arising from the same violations of law. And if the action is to bind individual persons who possess independent rights to compensation, they are entitled to receive notice that their claims can be precluded by the action which the state brings, unless they specify that they will not be parties to the action.

Title IV would address this question by providing for notice by publication and for the opportunity to "opt" out. It is, as others have testified at length, highly questionable whether notice by publication in lieu of individual notice can constitutionally bind those who do not participate. This is the problem addressed by the Supreme Court in the *Eisen* case and the constitutional issue does not go away by being ignored. It is foolish, of course, not to resolve it, for the requirement of actual notice imposes no real burden upon a public body.

The authorization to bring suit for damages to the general economy raises problems that cannot be so quickly resolved. As the Supreme Court noted in the *Hawaii* case in a passage discussed at length by other witnesses:

"A large and ultimately indeterminable part of injury to the 'general economy,' as it is measured by economists, is no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves under Section 4. Even the most lengthly and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the sovereign interests of the state." [23]

I refer to those provisions not simply to concur in the judgment that the premise for the action is inappropriate. Rather, I want to emphasize that the expedient adopted by Title IV to limit state actions to "nonduplicative" damages does not make the basic problem go away. *Hawaii* invalidates the "general damage to the economy" theory precisely because of the agony and futility of attempting to determine the dividing line between those damages which are compensable to

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[21] *See, e.g., Illinois v. Bristol-Myers Co.*, 470 F. 2d 1276 (D.C. Cir. 1972).

[22] The court's statement in the *Bristol-Myers* case, above, that "[o]nce properly in federal court on its own behalf . . . the State . . . may seek to proceed under Rule 23 as the class representative of drug purchasers . . ." implies that the State cannot act as class representative unless it is a purchaser or is otherwise similarly situated to consumers. *But see* the Supreme Court contrary suggestion in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972).

[23] *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1971).

persons and those which are not; to say that the state may now recover only "nonduplicative" awards perpetuates the same issue and the need to draw the same impossible [24] line.

The concept of damages to the general economy raises other problems as well. The antitrust laws equate injury to competition with injury to the public. Nevertheless, we have not viewed numerous antitrust violations as giving rise to causes of action for compensation to ultimate consumers. In part this is a result of the nature of some violations themselves.[25] It is also a function of a pragmatic judicial judgment, parallel to that made in *Hawaii*, that many antitrust actions have principal effect at earlier stages of the distribution process and it is futile to attempt to trace the "damage effect" of the violation through the distribution system, without incurring the same problems of duplicate recovery and identifiable harm. See the case of *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*[26] Here, I would hope that the "nonduplicative" damages computed by statistical device and authorized under Title IV do not revive the problems that the *Hanover Shoe* case has laid to rest; but the matter is far from clear.

Title IV, of course, perpetuates and aggravates some of the same problems of duplicate recovery and management that presently exist under Rule 23. Whether it be states, businesses or individuals that "opt out" of a Title IV action, some adjustment of aggregates must be made. These will either be adjustments related to the real world by determination of actual claims recovered in other suits or not involved in the pending suit or they will be adjustments by hypothetical estimates no matter what the actual claims may be. In either case the accommodation of conflicting claims to aggregates under Title IV is a problem of awesome proportions. It requires that the adjustment be made by an infinite number of techniques: "statistical or sampling methods, pro rata allocation of illegal overcharges or excess profits to sales occurring within the state or such other reasonable system of estimating aggregate damage as the court in its discretion may permit" to divide a hypothetical fund in circumstances where the method of determination and the amount of the fund itself is wholly indeterminate and highly discretionary.

I do not mean to suggest that the proposals of Title IV are impossible. Rather, I suggest only that problems of notice, duplication and management do not go discretionary.

I do not mean to suggest that the proposals of Title IV are impossible. Rather, I suggest only that problems of notice, duplication and management do not go away so long as we are concerned with the assessment of real damages by measurable standards and with their payment to persons who have suffered actual harm. Indeed, so long as these are matters of concern the problems remain even in the distribution of an established aggregate fund since, to the extent that compensation for actual injury is in fact involved, proofs of claims must still be entertained.

It might help to place some of these considerations in perspective if I refer for a moment to the due process issues which are so interrelated with questions of notice, duplication and manageability. As others have testified here at length, the courts have uniformly rejected on due process grounds any theory that would permit assessment of damages based on estimates that ignore proof of actual injury to individual plaintiffs. It is, of course, possible to avoid raising at least some of these constitutional issues—but only by an honest recognition that the aggregate damage theories and scheme of Title IV in fact establish a penalty system imposed by the Congress for violations of law.

My own review of Title IV persuades me that that is what is involved here. The text of the Title shows little concern for whether or not persons are in fact compensated for the actual injuries they sustain, and, in fact, assumes that substantial undistributed amounts will escheat to the state for use as part of the

[24] Moreover, the provisions' admonition against duplicative recovery applies only to Section 4C(a)(1) actions, and not actions brought by persons themselves. Unless this bill bars all private actions, or eliminates Section 4C(a)(2), there will always be the potential for double actions and double recovery—in connectoin with private actions brought both before and after an action on behalf of the general economy.

[25] Examples of violations which do not ordinarily cause measurable monetary damage to consumers are merger cases under Section 7 of the Clayton Act or cases under the Sherman and Robinson-Patman Act involving reciprocity, tying arrangements, maximum resale price maintenance, refusals to deal, sales below cost or illegal price discounting.

[26] 392 U.S. 481 (1968).

government's general funds.[27] It is also clear from the testimony thus far that the Title is desired more for its deterrent effect than for any other goal. This does not suggest that Title IV is "bad", but only that we recognize that it is a penalty provision and evaluate it by standards appropriate to that function. When it is so measured, Title IV is seriously defective.

The components of a penalty system should be balanced in some coherent whole. When viewed as part of a penalty system, Title IV irrationally singles out certain conduct for special penalties solely because of the level of distribution in which the conduct occurs. Even for these violations, Title IV differentiates the penalties on the basis of a particular kind of impact, *i.e.*, discernible effect on consumer cost, but without regard to the egregiousness of the offense or ramifications for other parts of the market system. By the automatic application of an unrelenting damage measurement the Title also removes governmental discretion from the penalty system itself.

In some respects, the absence of discretion may well constitute the most serious problem here. Antitrust violations are not all alike. Some involve blatant and inexcusable conduct clearly in violation of law. Others may involve close questions of law involving the "reasonableness" of conduct and even circumstances in which similar conduct has not theretofore been adjudged illegal. Under present policies of antitrust enforcement, we distinguish between these extremes by the exercise of discretion which permits tailoring a remedy or the fine to the nature of the offense and these determinations are made as an instrument of national policy. The penalty structure of Title IV not only removes the prosecutorial discretion as a practical matter, but converts a national policy into ad hoc policy determinations by the individual attorneys general of each of the fifty states under circumstances where the same type of discretion is not exercised at all.

It is true that we have successfully married the concept of damages and deterrence in the private action under the antitrust laws and private actions do indeed produce private attorneys general who seek damages pursuant to their own motivation and without regard to a particular national policy. But we have followed that course not simply as an aid in antitrust enforcement, but because the private action is in fact grounded upon proof of actual injury, it does in fact make injured persons whole, and it does seek to avoid duplicate recovery and provides an excess over actual damages primarily as a device to induce suit—not to penalize conduct.

It may well be that some damage concept of penalty assessment has both a utility and a significance in some rational penalty scheme. The concept is an intriguing one. But this type of approach would require far more in the way of thought and exploration into unchartered areas and, at the very least, a reconsideration of the entire antitrust enforcement framework of which it would be a part.

This leads to my final observation and it is one that you have heard before. We have newly evaluated the penalty scheme under the antitrust laws. We have put in place not only a new felony charge but substantially increased fines as well. I, for one, do not share the cynical view held by some that these sanctions are "license fees" to engage in antitrust violations. It is certainly not a criminal defendant who has expressed the view. If indeed our new sanctions prove ineffective, perhaps then is the time to explore new penalty concepts and ideas.

TITLE V—PREMERGER NOTIFICATION

Title V of the bill amends the Clayton Act to create new governmental authority with respect to acquisitions. In general terms, the title provides that a notice of acquisition is to be filed with the Government prior to closing. After filing, a waiting period is established during which the acquisition may not be closed

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[27] The relevant provision specifies that the courts shall provide a "reasonable opportunity" for individuals to secure a pro-rata portion of the damage fund "before any such damage fund is escheated or used for general welfare purposes". Experience indicates that large sums will in fact not be claimed by individuals. In the tetracycline cases, for example, where notice of the settlement fund was provided by publication in newspapers, 38,000 claims were filed by members of a consumer class numbering in the tens of millions, resultin. in $20 million in unclaimed funds. If Rule 23 were applicable, however, to require individual notice, more of a judgment fund might be returned to individual consumers. *Cf. In re Antibiotic Antitrust Actions*, 333 F. Supp. 278 (S.D.N.Y. 1971).

without Government consent.[28] If, during the waiting period, the Government issues a complaint challenging the acquisition, it may obtain a court order which (i) prohibits the closing of the acquisition pending litigation or, alternatively, (ii) permits closing but requires that the acquired operation be separately maintained pending litigation. The court must issue either order at the request of the Government.[29] There is an additional unintelligible requirement that if the acquired operation is separately maintained and the Government ultimately prevails, the acquired operation (and its profits) must be divested for an amount no greater than the original purchase price.

The notification requirements of Title V are to be implemented by the Federal Trade Commission which has authority, in this connection, to prescribe accounting methods for reports. The other provisions of the bill apply to either the Antitrust Division or the Federal Trade Commission: both are to be notified, the waiting period applies to the deliberations of both, and either may seek the court orders. The basic sanction under the bill is a provision of civil penalties of $10,000 per day for each day of a holding of stock or assets in violation of the provision. Finally, the title makes clear that the failure of the government to act with respect to an acquisition during the waiting period does not bar a later antitrust challenge.

The title changes existing practice and authority in three significant respects. First, the FTC already requires the filing of premerger notification reports and, as a practical matter, the need to file before merger establishes a *de facto* limited waiting period; Title V creates a long mandatory waiting period which may be further enlarged. Second, the FTC and the Department of Justice now have authority to seek a court order prohibiting the closing of an acquisition or requiring the maintenance of an entity in separate status; although Title V also uses court orders, it effectively grants to the government agency, rather than to the court, control over the issuance and terms of the orders. Third, if the government prevails in litigation, the court has discretion to order divestiture and specify the other terms of relief; Title V, in the case where a closing has been permitted under separate status order, removes court discretion and compels the issuance of a divestiture order in terms which set a mandatory maximum price for the divestiture itself.

The basis problems raised by the Title originate in the substitution of government fiat for an objective judicial judgment with respect to whether it is appropriate to bar an acquisition or maintain an entity in separate status until all litigation is completed. This means that so long as the government is willing to file a complaint, it can prohibit closing the acquisition regardless of the likelihood of the government's success on the merits and regardless of whether it might be possible otherwise to preserve the assets for appropriate divestiture or other relief should the government ultimately prevail.

While the Title theoretically contemplates that there may be cases in which an acquisition may be closed with the acquired operations maintained in a separate status, that possibility is not in fact a realistic alternative under the bill. This is because of the mandatory relief of divestiture which the court must order in all circumstances where the government ultimately prevails. Any potential defendant who proceeded to close with government "permission" would forego the possibility, in an appropriate case, of obtaining ultimate relief other than divestiture—or if circumstances change substantially—even some modified form of divestiture suitable to the change of circumstances. Any such defendant would also be directly penalized by having to bear all of the risk: (i) of loss in the value of the separate entity; (ii) of actual loss of any return on invested capital—even that return which might normally be realized elsewhere; or (iii) of all efforts or additional investment expended in the entity's behalf. Indeed, the mandatory relief in fact acts to deter successful operation of the separate entity pending litigation.

The net effect of the Title is to enable the government to thwart acquisitions whether or not they violate the antitrust laws and even in circumstances where

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[28] For major acquisitions the waiting period is 60 days. If the Government requests additional information, then it may extend the period until 30 days after all of the information is finally submitted. Major acquisitions are principally those which result in an entity, after the transaction, with assets or net annual sales in excess of $100,000,000. For other acquisitions, the FTC has discretion to determine whether to impose a notification requirement and to fix the duration of the waiting period.

[29] The provision provides that the court "shall" enter an order (1) prohibiting closing if the government "certifies . . . that it believes that the public interest requires relief pendente lite . . .," or (2) requiring separate status "upon application" by the Government.

there is no intention of bringing suit. The opportunities for delay by the government during the waiting period plus the opportunities to prohibit the acquisition pending suit enable the government to confront any company with a mandatory prospect that it will not be possible to consummate an acquisition for many years. Few companies, faced with that prospect, will be willing to pursue an acquisition should the government indicate its displeasure and even fewer still will pursue it once litigation is begun.

Were all acquisitions "bad" this proposal might make sense. But of course they are not. They are a practical way of allocating resources and clearly may promote the full workings of a competitive system. For this reason it is important to look closely at the justification proffered for the extreme result proposed by the bill.

The primary justification offered for the veto is the difficulty of obtaining satisfactory relief pending litigation. In the view of Assistant Attorney General Kauper, the Department of Justice has not been successful in obtaining preliminary injunctive relief in many cases "precisely because courts seem too willing to accept the proposition that divestiture is adequate relief [after trial] and thus preliminary relief is unnecessary." [30] I quite agree that divestiture is not in some cases an adequate remedy. As the Assistant Attorney General properly reasons, assets and personnel can be scrambled, making it difficult to restore the *status quo ante* and contributing to delays.

On the other hand I am far less certain about the Department's modesty with respect to its current lack of success. In a partial review encompassing some 51 relevant cases brought during the past ten years [31] I have found only one instance in which the Department failed to obtain either a preliminary injunction, or other interim relief in a case which it ultimately won on the merits. Indeed, in 47 of the 51 cases the Department obtained relief in some form either because: (1) the court issued or the parties stipulated to a preliminary injunction, or hold separate order, or some form of interim relief; (2) the court adopted a consent judgment or combined the hearing on the preliminary relief with a hearing on the merits within a few months (often a few days) after suit was filed; or (3) the transaction was abandoned by the parties.[32] The Department, of course, may be privy to much information we do not now have. But this type of record does not suggest that the Department requires a veto power to buttress its present authority.

Although the Assistant Attorney General did not say so explicitly, the Government's complaint may be that hold-separate orders do not constitute a sufficient form of preliminary relief in all circumstances. In the absence of specifics, the issue is difficult to address. In some cases, courts have granted complete injunctive relief where they viewed hold-separate orders inadequate. In others, courts have permitted consummation of the acquisition but have directed the acquiring company not to interfere in the activities and management of the acquired company. And in still others, courts have modified the terms of the preliminary relief initially granted as changing circumstances dictated during the pendency of the action. I am not aware of any pattern of hostility to the Department or of any blind acceptance of the notion that ultimate divestiture is always an adequate remedy at law or that hold-separate orders are always sufficient for the Government's purposes. To the contrary, what appears—at least on the surface—is discretion exercised by judges who like everyone else can make some mistakes but who appear to be doing reasonably well.

There are, of course, other alternatives if it is a prompt certainty of result that is desired. The Bank Merger Act addresses the veto power issue, but in a wholly different way. Under the Act, the Department has a limited time within which to challenge a bank merger. If the Department files suit within the statutory time period, the statutory stay goes into effect. If the Department does not challenge the merger, then it may go forward and the Department is thereafter barred from attacking it. This approach eliminates all uncertainty in the marketplace.

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[30] Statement of Assistant Attorney General Kauper at p. 34.

[31] Cases were treated as irrelevant for our purposes when Department actions were filed more than one year after the acquisition.

[32] The four cases where the Department was "unsuccessful" deserve some discussion. In only one did the court deny a preliminary injunction and subsequently order divestiture. In two other cases the Department's requested relief was denied because the court found no reasonable probability of illegality, and the Government ultimately lost on the merits. In the fourth case, a consent decree was subsequently entered in when the Department obtained approximately one-third of the relief it had initially requested.

It affords the effective veto of a statutory stay for the trade off of insulation of the unchallenged merger from later attack.

In any event, even the Department of Justice itself balks at the suggestion of a veto power in the form of unreviewable authority to impose an injunction. The Assistant Attorney General agrees that it is not "appropriate to give such unreviewable and irrevocable discretion to any government agency," and urges that the district courts be given some discretion to lift stays.[33] Unfortunately the standard suggested to govern the exercise of that discretion does not comport with this express concern for it leaves the automatic stay virtually as proposed in Title V.

Thus, Mr. Kauper suggests that the courts be given discretion to lift a stay "only upon a showing by the defendant of irreparable harm, or that the suit is arbitrary or capricious." [34] I do not know how *a defendant* could show irreparable harm save for a rare case such as impending bankruptcy. And to require a defendant to prove that the government's suit is arbitrary or capricious is to require him to prove more than he would have to prove on the merits.

The urge to deprive the courts' of their discretion is an urge I can understand. Courts can and do make erroneous judgments and market conditions can change so that divestiture is more difficult than it would otherwise have been. Besides, no litigator likes to lose motions for preliminary injunction. But the alternative, for many of the same reasons, is no merger or acquisition at all—for as I have said, the power indefinitely to delay a merger is, because market conditions change, the power to veto. The difference is that under current law, two independent branches of government can and must exercise independent judgment, one in deciding whether to seek relief and the other in deciding whether to grant it. Under the proposed scheme, the decision is wholly unilateral—and for that reason subject to abuse. It is the present circumstance we should clearly prefer.

APPENDIX WITH RESPECT TO TITLE II

1. Subsection 201(g) of Title II would provide for the granting of use immunity to compel the testimony of a witness who raises the privilege against self-incrimination. If enacted, this provision might find a surprisingly common use. Information gained through CIDs may be used in subsequent criminal proceedings, yet a witness under Title II would not know if he were a target of prosecution, nor would he necessarily know much about the subject matter of the Department's inquiry. Caution might often indicate reliance on the privilege. If it is true that utilization of use immunity might not be uncommon, I urge the Subcommittee to heed those who have spoken out about the abuses inherent in this form of immunity. Senator Kennedy recently declared:

"The very real threat to the rights and liberties of individuals in the way that 'use immunity' has been interpreted [by the courts] . . . ought to cause serious pause to every person.

"We have seen how 'use' immunity has provided one of the greatest threats to the fifth amendment since the founding of this Republic." [35]

The problems posed by use immunity are, of course, directly related to the fact that Title II would extend the CID power to cover private persons.

2. Subsection 201(e) of the proposed Title II would allow the Department to compel testimony on any subject that a grand jury investigating a suspected antitrust violation is permitted to probe. It has recently been made clear that a witness appearing before a grand jury may not refuse to answer questions on the ground that they are based on unlawfully seized evidence. *United States* v. *Calandra, supra.* Does the bill intend to permit the Department to utilize illegally seized evidence in the same way? If so, would it be constitutional, given the real differences between the roles of grand juries and prosecutors, despite the attempt to blend the two in Title II?

3. Subsection 201(c) of Title II refers to persons who "may have reasonable means of access to, any documentary material, or may have or may reasonably be able to secure any information. . . ." It would expand the duty to produce information to extend beyond the traditional concept of possession, custody or control. The intent behind this change is unclear, particularly when it is read together with Subsection 201(g), which would require people to sign sworn certificates and oaths swearing to the completeness and accuracy of document productions and answers to interrogatories—a requirement that does not appear

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[33] Statement at p. 34.
[34] Statement at p. 34.
[35] Hearings on H.Res. 220 et al., *supra*, at 22–23 (Testimony of Senator Kennedy).

in existing law.[36] Read literally, these two provisions seem to suggest the subjection of private persons to a sworn duty to act as investigative agents for the Department and to probe into the files and records of others.

4. Section 5(e) of the present Antitrust Civil Process Act directs adherence to the Federal Rules of Civil Procedure, unless supplanted by other provisions of the Act. Title II would not amend Section 5(e), yet it would create an alternate system of document demands, interrogatories and oral depositions as comprehensive as that set forth in the Federal Rules but with fewer protections and different requirements. The following examples are illustrative:

(a) Subsection 201(e) of Title II would require a person to meet a standard of "undue or oppressive burden" in order to quash written interrogatories. The term "undue" suggests an inquiry into relevancy, yet, as noted earlier, the concept of relevancy would have few limits under Title II. Moreover, this standard apparently offers less protection than the Federal Rules, which shield persons from "annoyance, embarrassment, oppression or undue burden or expense. . . ." F.R. at p. 26(c).

(b) Subsection 201(g) of Title II apparently would deprive a witness of the traditional power to suspend a deposition in order to go to court to seek a protective order against harassment. See F.R. at p. 20(d). No matter how abusive the interrogator, under Subsection 201(g) a witness apparently would have no option but to sit there and take it or to refuse to answer and permit the government attorneys to go to court and seek an order compelling answers. In the latter event there may even be a question about whether a court, responding to the government's petition, would be permitted to do anything more than protect evidentiary and constitutional privileges. There is no provision for protective orders against harassment.

5. Subsections 201 (p) and (q) of Title II would compel production of materials not specifically objected to in a pre-production petition for judicial review and would enforce a waiver of objections not raised in court within 20 days of service of a demand (absent good cause for failing to raise objections). There is no showing of any need for this proposed preclusion of judicial review. In 1962, Congress put a high premium on easy access to review. See, *e.g.*, 108 Cong. Rec. 3998 (Congressman Celler). Moreover, these provisions may call for litigation in advance of expiration of the period allowed for production—which means under great time pressure and often before it is possible to review material and potential testimony in order to make an orderly assessment of what is demanded and of whether possible objections are frivolous.

Senator HART. Our next witness is both an old friend of the subcommittee and a very distinguished Philadelphian. I would like to welcome again Harold E. Kohn.

STATEMENT OF HAROLD E. KOHN, ESQ., ATTORNEY, PHILADELPHIA, PA.

Mr. KOHN. Thank you, Senator, for your very kind introduction. I have filed a prepared statement* with the requisite number of copies, and I do not want to bore you with a repetition of that. I did not come here to testify about title II.

I feel like a fellow walking on a street, when he sees a young lady about to be raped. I think you have got to get involved. I think the hyperbole that you heard is completely without foundation. Let us look at a number of things, for example.

Senator HART. I am glad you happened to be coming along.

Mr. KOHN. In the act itself, in section 201, for example—I think it is subsection D—the Department of Justice is required to state the nature of the conduct constituting the alleged antitrust violation, which is under investigation, and the provisions of law applicable thereto.

[36] Two commentators refer to such an "affidavit of compliance" as "an attempt to obtain testimony from an individual which was expressly and deliberately omitted from the [1962] Act." Withrow & Litwack, "The Antitrust Civil Process Act," 20 Bus. Law. 5 (1964).

*See p. 472.

He has got to describe the class or classes of documents with such definiteness and certainty as to permit such material to be fairly identified. You have ample opportunity to go before a court, if you do not like what he is asking you. And I think nobody can, with a straight face, really tell you that this is some sort of horrendous proceeding.

I thought for a while that Mr. Lerman had thought that he had walked before Senator Church and the CIA Committee.

This is not appreciably different from what I can get by spending $25 to start a lawsuit. I can start an antitrust suit, if that is what they want. If they want to be sued by the Government, before they know whether there is or is not a case, it seems to me that they are hurt more by that.

This enables the Government to make an objective determination before it starts the case; instead of starting the case, or going before grand juries for extended periods of time, and then finding that they have nothing; or starting a grand jury investigation and then deciding, well, they should make it civil, and then they are sort of hung high on whether to make it civil, because they cannot, or whether to go ahead with a criminal investigation or criminal prosecution when they would rather not.

And so on, right down this, section by section. You heard a great deal about, "We have got to do this in 20 days." Well, their office has never filed anything in 20 days. I am engaged in litigation with them from time to time. The Federal Rules of Civil Procedure say you are supposed to file things in 20 or 30 days. I have never yet seen the time when they have not come in and gotten extensions of time, and generally they file in about a year.

And I am sure that in this situation, they are not going to file in any 20 days, and their clients are not unsophisticated people. They know precisely what they are doing. And they have more lawyers to counsel them than the Department of Justice does. So that I think this is just a red-herring dragover.

I think in this day, when corporations and individuals are required to—and the Government itself, under the Freedom of Information Act—required to furnish such tremendous amounts of information, they ought to have become acclimated to it by now.

Look what corporations furnish to the SEC and IRS. Look what the public utilities have to furnish to the FPC or to the State public utilities commissions, that do not even have whatever prestige attaches to the Federal governmental agencies.

The Department of Justice has to ride herd on the administrative agencies. There is no greater support for antitrust violations and monopoly in the United States than certain of the Federal agencies. The FCC, for example, has perpetuated a monopoly in the broad. casting industry. And I am engaged in a litigation with them in that respect, too.

So I think I know what I am talking about. You cannot make antitrust violations, says the FCC, an issue in the proceedings before the FCC until you first prove that there is an antitrust violation.

But how are you going to prove that there is an antitrust violation, if you cannot make it an issue and get discovery. Now, that is the

sort of hocus-pocus that I think the Justice Department has to get rid of.

And I think it is a good thing, I don't think anybody is going to be hurt by this. The courts, actually, are going to be much more careful not to permit the Justice Department to abuse its powers than they are in private antitrust cases, where you file interrogatories and document requests a mile long. And if somebody goes and protests to the court, he says, "You are experienced, counsel, work it out."

But I am sure that the courts are not going to say that here, when the Justice Department comes in, because I think the courts are always more concerned about the criminal rights—the rights of people who may be prosecuted for criminal proceedings.

And I really had to laugh about that business about the "secrecy." If he comes back, and you have taken out of this act the secrecy provision, they will take his epaulets off. This is something that they have always insisted upon. It is the plaintiffs—the people who are investigating antitrust—who want to get rid of the secrecy.

The defendants fight you tooth and nail. You try to get something that the grand jury has had—you try to get something they submitted to the grand jury, and they oppose it as vigorously as they possibly could.

If these depositions were taken in public so that everybody who has got a potential antitrust action could come in and watch it, they would scream bloody murder. And, you know, it just does not make any sense—well, that is another topic.

Senator HART. Thank you very much.

Mr. KOHN. Now, if we can get to what I did come here to testify about—two subjects, really, primarily.

One is the parens patriae, and the other is the nolo contendere.

It seems to me that now, with many of the State governments and attorneys general taking a much more active interest in antitrust enforcement, that they should be encouraged to do so by permitting them to bring suit on behalf of people in the community, or on behalf of the general economy of the community.

Now, Professor Handler, my old friend, and others have testified that those things are meaningless and so on, but they are not.

Let us start at what they think is the outer edge, the case where you file a suit because of damage to the economy.

Well, I guess almost 40 or 50 years ago, Gov. Ellis Arnold started a suit against the Pennsylvania Railroad on behalf of Georgia, seeking an injunction, because what they were doing was damaging the economy of his State.

Now, I think you can ascertain monetary damages. For example, we know that just the other day the FTC indicated that there ought to be litigation with regard to the people in the natural gas business, who are conspiring to take natural gas off the market, conspiring to raise prices.

Well, I know up, through Pennsylvania, whole communities have just come to an absolute halt, and New Jersey, too, because the factories that needed the natural gas are out of business.

Now, you cannot tell me that somebody cannot determine what the damage is to that community. And if somebody down in Texas, or wherever they are, with the natural gas reserves, want to play fast and loose, I think they ought to realize that it is they, and not the community, which goes down the drain, which is going to bear the economic cost of that sort of thing.

And I think it is very easy to determine.

Let us cover the next thing, the kind of suit where the government—the attorney general of the State brings an action for injuries sustained by the people in the community, in their individual right, although the State itself has not bought the particular product.

I may state, parenthetically, there is no problem at all where the State is also a purchaser, because that is a typical class suit under section 23.

But let us assume that it has not, and you have simply the States bringing action as parens patriae, on behalf of the people in the community.

Perhaps that ought to be confined to natural persons. Maybe they do not have to bring actions on behalf of corporations. I do not take any very strong position one way or the other on that. But there are many instances where nobody will bring an action, because he just does not have enough interest, or because the amount of damages are small, or because he is afraid.

In every situation, you see people who are purchasers from major suppliers who are afraid to bring suit against them.

Now, those people ought to be protected, and the State can do it by the parens patriae method of suit. I may say it is against my interest, because part of my practice, as you know, is instituting class suits on behalf of people who have been injured by violation of the antitrust laws.

And I am urging that you establish a very energetic competitor to me. So I do not think I have any possible personal interest, but I think if you are interested in enforcing the antitrust laws, I think the antitrust laws are one of the pivotal statutory schemes in our economy, I think you have got to have private enforcement.

Even the million-dollar fine, that doesn't mean a darn thing, when people have profited to the tune of $100 million of $200 million, or $300 million. It is just a license to steal.

The courts are not going to send many people to jail for many years. And if they do, that is irrational. What you want is to get the people who have suffered the damage reimbursed, and that is both rational, whereas the criminal procedure is to some extent irrational, to punish people, although it may have a deterrent effect.

And also, it achieves a deterrent effect as well. I think many of our more coldblooded industrial corporations would be more interested in saving $100 million than they would in having some vice president or sales manager stay out of jail.

Now, I think that covers most of what I have to say about parens patriae.

Now the defense bar—and I should say—I said it on the record before, as you indicated, I have been testifying here for some 10 years—I do represent defendants. I do represent major corporations, as well as plaintiffs, so I think I can approach it with some objectivity.

The parens patriae suit will have the salutary effect of imposing a real obstacle, an obstacle which is commensurate with the damage done, and suffered by the injured people, as nothing else possibly can.

And I think that the States ought to have that right. They are not going to file suits all over the horizon. They have the right to file a number of suits.

There have been a number that have been filed. But they have not been inordinate in amount. They have not been abusive. As a matter of fact, the State attorney general is sometimes considerably more responsible than an individual lawyer may be.

A lot of individual lawyers are somewhat on the extreme side. Some public officials in the attorney general's office, too, but generally they have to go through more of a hierarchy before they can start the suits.

I think you have more protection in that manner.

Now, the other thing I want to talk about is nolo contendere.

It seems to me—and I don't mean to be facetious—but we would almost be better off if there was no nolo contendere, or if there was no section 5 in the act, because under the common law, as it has developed over the period of years, if somebody has lost a suit or stipulated or had his judgment entered against him, and in a nolo contendere case, they enter a judgment of guilty, he is collaterally estopped thereafter in any litigation from denying those facts and those legal obligations, which are incident to the finding of guilt.

So that what you do by stating that you must introduce evidence, or that you cannot introduce a consent decree, for example, if you have not introduced evidence, is to limit the right to use the Government's action, which absent the statute, you could do anyway.

Now, when the act was first passed 50 to 60 years ago, I assume that that was regarded as a progressive measure, because the law of collateral estoppel had not developed to where it is now.

But if you estop any other kind of litigation, or if there is any other kind of criminal suit—I represented the Commonwealth of Pennsylvania, for example, in that mine thing, where some people went to jail because they cheated the State out of some $8 million, fictitiously filling holes. They were supposed to stabilize abandoned mines. Well, they were convicted. Some of them pleaded guilty. When the civil suits were filed, those convictions were held to be collateral estoppel, and they could not deny that they had cheated the State, so the only issue was the amount of the damages.

And the same thing, I think, would apply to antitrust laws. Some of it, while it may seem extreme, and I do not think we ought to experiment, not particularly in the present climate, but I do think that this bill that you have here, is one small step to putting antitrust defendants on the same footing with all other defendants. You are not penalizing them. You still have not put them where everybody else is, but you have made a step toward it, so that I think you ought to pass this bill as it is in that respect.

Now, anything that you want to ask me, I will be glad to cover. I did briefly allude to some of these things in the very short statement.

But one other thing I want to remind you about—Professor Handler's presentation here, in which he referred to the antibiotics case on the parens patriae concept in settlements of more than $150 million. I do not know whether he told you that he got about $15

million of that for his clients, the Blue Cross, and nobody in that case undertook, really, to find out what the damages were.

They made a statistical "seat of your pants" guess. The case was originally settled for $120 million, of which $100 million went to the Government and individual consumers, and $20 million to hospitals and Blue Crosses.

Well, he wanted some more, so actually, I think the hospital-Blue Cross settlement turned out to be $30 or $34 million. The money was divided up, not based on what a particular Blue Cross had actually spent for antibiotics, but it was divided up based on beds or the number of subscribers, or some such arbitrary thing.

And if everybody decided things that way today, I mean, government and industry would come to a halt if you had to make individual determinations on every issue.

It is like collective bargaining. You can no longer have a 1-to-1 relationship. You do not decide whether this employee is a little better and he ought to get $12.10 and the other fellow $12.08.

You have to deal in broad category. And now you are putting it in the statutes. They have been screaming ever since rule 23 was adopted by the Supreme Court, that you cannot change the substantive law by a rule, that when you had this pot of gold, or the fluid recovery concept, and so on, that was a usurpation, an abuse of judicial authority.

Well, now you are giving them a statute. So now they retreat to the next stage, that it is unconstitutional. Well, I do not know when, but I cannot remember many Federal economic statutes which have been held unconstitutional. And I just do not think there is anything to that argument at all. And I think it is the way these cases are going to go. It is the way a dozen of them have already gone.

And, as I say, Professor Handler happened to have been a happy recipient of the *Antibiotics* case, which he, himself, criticizes.

That was the last thing I wanted to say, sir.

Senator HART. I do not know whether you have had a chance to read the testimony earlier this week from the Assistant Attorney General, Mr. Kauper.

Mr. KOHN. No; I have not seen that, sorry.

Senator HART. Well, he made several points with respect to nolo, that really a private plaintiff, in a civil action would find very little benefit if the nolo plea could be used in the fashion that the bill proposes, as you suggest.

And second, that the Department's workload very probably would increase because nobody then would plead nolo.

With respect to the first, how beneficial to a private plaintiff is it?

Mr. KOHN. It is beneficial not so much from strict rules of law or to the amount of the case which is disposed of, because in many cases all a nolo plea does is take care of, for example, a conspiracy. It does not even say the conspiracy materialized in actual event beyond the conspiracy.

It is limited, frequently, to 1 day or to a very short period, but it has a tremendous psychological effect. And if you have ever sat through litigation and seen how defendants fight so vigorously to try to keep it out, they know that once the jury has realized that they did not care to oppose the Government's claim, that psychologically you have a jury which is disposed in your favor.

Now, that does not mean that the jury will give you what you want, or that the jury will decide across the board for the plaintiff, but it does have a very important psychological effect.

Now, it may be that there will be fewer nolo pleas or consent decrees. I would think you ought to try it and see what happens. Otherwise, you will never know. It can always be changed. And as I say, bear in mind it is no different, or rather, it is less onerous as far as the defendant is concerned from any other type of criminal proceeding, now.

Antitrust proceedings are not, I suppose, to be equated with bank robbers, but there is a certain uniformity throughout the law, a certain symmetry, so I would say we ought to try it.

If it means that he has to try every case, then perhaps, we ought to take another look at it down the pike. I do not think he will, because if he tries the case, he will have everything spread out on the record, so that all that the plaintiff in the civil case has to do is to get the papers and begin to put them in his case, whereas if he got the nolo plea, the plaintiff still has to do all his work, because otherwise, all he has got is a conspiracy on one day, which is not going to give him any damages.

So that there will still be people taking nolo pleas, and there will still be people filing consent decrees.

And then, more basically, what have you got when you get a nolo decree—what have you got? The Government has said that you are naughty, you violated the antitrust laws—so what? If you make enough money out of it, people are not that sensitive. It is only when you do something with the civil litigation later on. It is the civil litigation that really enforces the antitrust laws. You can have a string of nolo pleas a mile long, and you can have violations of the antitrust laws 3 miles long—who cares?

What does a consent decree do, generally, unless it is a divestiture decree or something like that. It just says, "Don't violate antitrust laws."

So that it is—in my opinion—it is making them give back what they got by violations of the antitrust laws that is really going to enforce the antitrust laws.

And I think, as I said before, the antitrust laws are a basic part of our economic and legal structure. As you probably know, way back in the 18th century, it was illegal to conspire to fix prices, the *Cordwainers* case or the *Philadelphia Carpenters* case, or whatever it was, it has been a fundamental part of our policy.

It is the only thing, really, that stands between us and a kind of feudel system. If you have everybody working for a couple of big corporations, you are going to change the nature of America radically, and I think we ought to do whatever we can, for example, to prevent mergers.

One of the reasons, I think, for our credit crisis, was that you took $300 or $400 million out of productive lending and turned it over to "A" to turn over to "B" to buy "B's" company. The net result was zero as far as improvement of the economic facilities of the country was concerned, the productive facilities of the country.

But it used tremendous amounts of capital. Now, I say, anything we do to make that less common, I think, is good.

Similarly, price fixing—one of the elements in inflation is undoubtedly price fixing. And it sometimes hits the people who can least afford it.

The antibiotic industry was an absolute disgrace with the price fixing there. They were charging $6 for something that cost 60 cents. And I think the only way you are going to enforce this is to make them give back the $5.40 over and above the 60 cents. Otherwise, you can give them all the consent decrees and all the nolo pleas that you want.

Senator HART. Thank you for some very interesting philosophical and practical observations.

Are there any questions?

Mr. CHUMBRIS. No.

Senator HART. Mr. Kohn, thank you.

Mr. KOHN. A pleasure always to be here.

[The prepared statement of Mr. Kohn follows. Testimony resumes on p. 474.]

PREPARED STATEMENT OF HAROLD E. KOHN, ESQ.

This Bill, in substance, will materially aid effective antitrust enforcement at both a private and public level.

Although I will focus my attention on Titles IV and VI, I do believe that Titles II, III and V generally make good sense.

Title II is a desirable addition to the power of the Justice Department in antitrust investigations. It should, however, be balanced against the individual interests of those being investigated. As a result, I would favor a change in the present language so that the information available is limited according to the traditional standard of "possession, custody or control".

Title III makes sense as a means of expediting Federal Trade Commission activity consistent with due process requirements.

Title V is badly needed in view of the large number of mergers in the present economy and the difficulty of separation once merger occurs.

The strengthening of Title IV, the parens patriae section, will serve as a necessary detriment to antitrust violations. By allowing the state Attorneys General to file antiturst actions as parens patriae for its citizens, this section gives individual consumers protection where collective harm is great, but harm to single consumers is not enough to compel private action. It codifies and clarifies case law in this area. See, *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 284 (S.D.N.Y.), *aff'd*. 449 F. 2d 119 (2d Cir. 1971). It allows the Attorney General to act as representative of a class of persons within the state who have been damaged. It could serve as an alternative to private class action procedures which have been limited in recent decisions. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).

The Attorney General can also act as parens patriae and sue for damages to the general economy of the state. This essential provision will enable these political units to recover for economic losses occasioned by illegal conspiracies restraining trade. Such recovery was intimated long ago in *Georgia* v. *Pennsylvania Railroad Company*, 324 U.S. 439 (1945).

These provisions cannot be attacked on the ground that the damages included are speculative. Damages in antitrust suits are often speculative. As the Supreme Court suggested in a leading case, *Zenith Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971):

"In antitrust and treble damage actions. refusal to reward future profits as too speculative is equivalent to holding that no cause of action has accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered. Thereafter, the plaintiff may sue to recover them at any time within four years of the conduct from which they flowed, would be forever incapable of recovery, contrary to the Congressional purpose that private actions serve as a bulwark of antitrust enforcement, and that the antitrust laws fully protect victims of the forbidden practices as well as the public."

The damages can be computed in relation to the unjust enrichment of the corporation rather than the precise measure of injury to the individual consumer. Damages to a state may be computed on the basis of decreased production and increased unemployment and welfare benefits expended. The standards given in the Bill provide guidelines for such computations.

Certainly, Professor Handler's concepts of privity and damages as expressed in his statement, are neither good law nor good sense. The law provides and should provide, remedies where wrongs occur. The fact that individual damages may be small but the aggregate amount flowing from the wrong may be large, should represent a challenge to the Congress and the Courts rather than an excuse for the wrongdoer to keep the fruits of his illegal activity.

I believe, however, application of this provision should be limited by express language to natural persons. The Bill is designed to protect consumers whose resources are insufficient to bring their own suits. I would agree with antitrust chief Mr. Thomas E. Kauper that the dissimilarity between claims brought by consumers and corporations may unnecessarily add to the difficulties of litigation.

Allowing the U.S. Attorney General to sue where a state Attorney General does not, will greatly promote antitrust enforcement. A state Attorney General will be more conscientious pursuing violators; and, the consumer will not be deprived redress because a state Attorney General is lax or understaffed or otherwise unable to pursue legitimate claims. It also allows the Government to settle both civil and criminal claims against the defendant at one time. The ninety day notification requirement and the opportunity for state action help to balance the interests of federalism with those of strong antitrust enforcement.

The state should recover treble damages for harm sustained in connection with federally funded state programs affected by antitrust violations. However, the Federal Government needs no incentive to enforce antitrust laws, "a heavy responsibility with which it is already charged." *Hawaii* v. *Standard Oil Company*, 405 U.S. 251, 276 (1971). Section 4E of this title should be made more explicit on this point.

Title VI of the Bill permits the use of *nolo contendere* pleas in a criminal case as prima facie evidence in civil antitrust suits. There is no real difference between a plea of guilty and a plea of *nolo contendere*. Both pleas make the party guilty for criminal purposes subject to the same penalty. Those who plead *nolo* must believe they will be found guilty by the Court. Both pleas, in logic, should have the same collateral estoppel effect. But, while the fine imposed under a *nolo* plea is no more than a "slap on the wrist" to big corporations, guilty pleas have been used in many instances as prima facie evidence in subsequent civil suits. *Armco Steel Corp.* v. *State of North Dakota*, 376 F. 2d 206 (1967).

Court has suggested that by Section 5 of the Clayton Act, "Congress intended to confer, subject only to a defendant's enjoyment of its day in Court against a new party, as large an advantage as the doctrine of collateral estoppel would afford had the Government brought suit." *Emich Motors Corporation* v. *General Motors Corporation*, 340 U.S. 558 (1951). It is time the anomaly between these two pleas is erased.

The change in the effect of the *nolo* plea will aid private individuals in their suits. It is part of the purpose of the Sherman and Clayton Acts to have private suits act as a deterrent to anticompetitive behavior. As Justice Brennan suggested, "Private litigants, encouraged by the hope of treble recovery, [are] seen as a major instrument of antitrust enforcement, supplemented by criminal prosecutions and civil forfeiture actions brought by the Federal Government." *Hawaii*, 405 U.S. at 275. Private individuals will now be more encouraged to bring suits, knowing that their burden of proof is reduced and their chance of success is greatly increased.

This provision also allows for more efficient litigation. Retrial of these civil cases would needlessly increase the costs of private suits, misuse court time and impose heavy burdens on private individuals by requiring them to go through discovery of the same documents and testimony that were reviewed previously in the earlier suit. The Government has these papers. The Court already has heard these facts. The use of the *nolo* plea as prima facie evidence would reduce the cost of suit to the private litigants as well as save Court time and effort. This is important today when expeditious use of Court resources has the highest of priorities.

To further this effective use of Court time, private litigants also should be given access to other materials used by the Government in its investigations, such as non-confidential material and reports of Grand Jury findings. In making available to private litigants this investigative material previously obtained by the Government in antitrust actions, the burdens of private suits will be further minimized.

The great weight this plea of *nolo* will be accorded will not remove flexibility from Government antitrust enforcement. Defendants will still be free to plead if they desire to do so. A rebuttable presumption cuts off no defense, interposes no obstacles to a full consideration of all the issues and takes no question of fact from

either jury or Court. See, *Farmington Dowell Produce Co.* v. *Forster Mfg. Co.*, 421 F. 2d 61, 75 (1970). No one is deprived of "a day in court". The issues are merely simplified.

In addition, I strongly support Title VII, particularly Section 701. There is simply no valid reason why the reach of the Clayton Act should be less than that of the Sherman Act.

In view of the recent Supreme Court decision in *Gulf Oil Company* v. *Copp Paving Co., Inc.*, 1974–2 Trade Cases, ¶75,402 (U.S. Sup. Ct.), it is obvious that the Courts will take even a more restrictive view of the "in commerce" provisions of the Clayton Act including the Robinson-Patman provisions than they have in the past. Congressional action here will make unnecessary further litigation on this point and make the Clayton Act an equal partner of the Sherman Act as Congress originally intended.

Section 703 of Title VII will also act as a useful measure in strengthening the hands of the Courts in dealing with multinational companies. Since most major corporations are multinational, this section is most important.

It codifies Court remedies for failure of any person to furnish discovery or evidence on the ground that a foreign statute prohibits compliance. Although Rule 37 may include stricter language, the Bill does show Congressional intent that the Court deal harshly with such a situation. For these reasons, I favor this section.

Finally, I would like to comment on the amendment to the Bill proposed by Senator Bayh. I applaud the proposal as a means to revitalize Section 2 of the Sherman Act. It enables the Government to reach unreasonable restraints of trade without defining the relevant market or proving a dangerous probability of success in the attempt to monopolize that market. Such legislation is certainly needed to curtail exclusionary activities aimed at competitors. However, the language of the amendment is so inclusive as to transform some usual business practices into criminal conduct. I would suggest that the Bill state merely that unilateral attempts to restrain trade and the use of predatory practices toward that end be a violation of the Act.

I also support the civil penalty of not more than 20% of gross revenue received by the corporation during the period of an antitrust violation. This additional remedy makes it less likely that the violator would gain economically by its anticompetitive activities. In doing so, this provision would add to the present remedies and provide a more effective deterrent against antitrust violations.

The Bill, together with the proposed amendment would effect a greatly needed re-enforcement of the present antitrust laws; it would expedite Court procedures; give added weight to antitrust enforcement; and further the Congressional policies of promoting competition and a free economy. I support the Act, with the minor changes I have recommended today and urge swift passage of this Bill into law.

Senator HART. Now, our next witness whom we welcome and express regret that we have inconvenienced, is Jonathan Rose, professor of law at Arizona State University.

STATEMENT OF PROF. JONATHAN ROSE, COLLEGE OF LAW, ARIZONA STATE UNIVERSITY, TEMPE, ARIZ.

Professor ROSE. Thank you, Senator Hart. I first want to express my appreciation to the committee for offering me the opportunity to testify on what I think is a very important change in the antitrust laws, the authority for the parens patriae suits.

I want to allay any fears that I intend to read my statement. I have prepared a very lengthy statement on a number of questions of public policy and constitutionality. I would ask that it be submitted for the record.[1]

I will briefly summarize some points, and deal with some other issues that have come before the committee during the testimony of previous witnesses.

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[1] See p. 484.

I think the general need for parens patriae authority has been well illustrated. We are dealing in large part with price fixing, and we are dealing in large part with cases involving numerous individual consumers who have small claims.

I think that I have documented in my statement, that rule 23 has really failed as an effective remedy, and the common law doctrine of parens patriae has been refused extension.

I think Mr. Lerman, in his remarks, is unduly optimistic about the future of rule 23 as a remedy here. I think some of the aftermath of the *Eisen* case, and particular cases like the *Kline* decision in the 9th circuit show that some courts are going to show—if this is possible to believe—even greater hostilities than the 2d circuit did in *Eisen*.

I think Mr. Handler's suggestion, that we are sort of stealing the claim of a private antitrust consumer, is just not accurate. What we are dealing with is one person, the individual consumer, who has not found an effective remedy for his antitrust injuries. I would add, although this is dealt with in some detail in my statement, that I believe the bill ought to be limited to recovery on behalf of natural persons.

I think that the quotation I have used on the front of my statement, regarding the profitability of price fixing indicates the general need for this bill.

I think that the recent article in Business Week, from where I took this quotation——

Senator HART. I just tore that off of your cover page. I am going to put it in my pocket. I am glad now that you are going to confirm that it did, in fact, appear in Business Week.

[Quotation follows:]

> When you're doing $30-million a year and stand to gain $3-million by fixing prices, a $30,000 fine doesn't mean much. Face it, most of us would be willing to spend 30 days in jail to make a few extra million dollars.—Former vice-president, Phoenix bakery firm indicted for price fixing. Business Week, June 2, 1975, p. 48.

Professor ROSE. I have a copy of the issue in my briefcase. I would be glad to send a copy to the committee.

I think the whole article makes one thing clear: price fixing will continue until it is unprofitable to engage in that type of activity.

The quote that I used is a rather striking example, but the whole thrust of the article, which is interviews with a number of industry people, many of whom have been convicted of price fixing, is that it is a way of life in the industry, and it will continue until it is unprofitable to do so. And it will not become unprofitable to do so until you add new kinds of remedies to the antitrust laws such as parens patriae authority. I heartily endorse everything that Mr. Kohn said in his testimony a few minutes ago.

I think you have had consumers here looking for a remedy, and they have gone from the proverbial pillar-to-post, rule 23 and the Attorney General under existing law, and they have come up empty-handed.

If I can read a couple of lines from my statement, I think a rather interesting situation results. Antitrust violators, those who injure a large number of consumers with small claims, obtain a certain amount of immunity in the process. And this, of course, diminishes the deterrent effects of the antitrust laws, and more importantly, undermines the congressional purpose in affording treble-damage actions for their deterrent effect.

As a matter of fact, a certain dilemma—one not without irony—has developed. The greater number of persons who are injured by an antitrust violation, the less chance the transgressors, normally price fixers, have of being effectively sued by those injured, and the greater chance they have of retaining the profits of their illegal activities.

It seems to me that what emerges now as an appropriate solution to that problem is a parens patriae action by the State attorney general, and I strongly endorse the bill, for the variety of reasons. In summary the bill that this committee has drafted, answers many of the problems raised by the courts and commentators in the rule 23 context, and many of the complaints in the common law parens patriae actions. And that is all dealt with thoroughly in my statement. I will not go into it again.

I might add one thing that I have not talked about in my statement. It seems to me that it is very appropriate to give this role to the State attorneys general. It is very much in the spirit of what we call cooperative federalism. They are very interested in doing this. The people who are injured live in their States. They have the duty to protect those people. They are the enforcers of the State law on consumer protection as well as the other laws that protect the health and welfare of consumers.

I spoke last night with Attorney General Bruce Babbitt of Arizona, for whom I am setting up an antitrust enforcement program this summer. He particularly asked me to put his views into the record. He strongly endorses the concept of parens patriae. He thinks it is the type of thing that State attorneys general ought to be doing. General Babbitt was elected last November and he has started a vigorous program of enforcing laws involving consumer protection and antitrust. He wanted his strong support of this bill made public.

Departing from the general, let me deal with some of the problems that have been raised by the prior witnesses.

There has been a substantial claim that the notice provisions in the bill are unconstitutional. I have dealt with this in great length in my statement so I will just deal with it very briefly in summary.

In the first place, the claims made are supported by no analysis, and they really read the cases improperly and fail to distinguish those cases where the Supreme Court has held that notice by publication is unconstitutional.

There are a number of reasons why I strongly feel that notice by publication, in principle, is constitutional in parens patriae actions. I will summarize those reasons, although they are spelled out in much greater detail in my statement.

The nature and the size of the claims, the difficulty and the cost of giving notice, the adequacy of representation by the State attorneys general, the damage provisions that are in section 4(c) and the strong governmental interests in affording a way of reimbursing consumers who are injured in general, in particular those who are injured by antitrust violations.

The clear answer is, that the constitutional test—the due process test—is a practical one. And I think all those reasons that I have suggested strongly suggest that notice by publication, in general, is constitutional. I have talked this matter over with several procedure teachers on my own faculty and around the country, and they agree with my conclusion.

I think there are some particular problems with the specific notice provision which is in S. 1284. The amendments that would be necessary are dealt with, in some detail, in my statement. I would be happy to give whatever assistance the staff may wish in pursuing those amendments. I do not feel it is really necessary to go into that detail now.

I will rest on my statement regarding damages to the general economy, and the last thing I want to take, which has caused the most controversy, is the concept of recovery of aggregate damages.

I think the first point to make is, that if you desire to increase the deterrent effect of the antitrust laws, and give State attorneys general the right to sue, it will not be meaningful unless you have recovery of aggregate damages. If he has to go in and prove each claim and parade on every citizen of the State who bought price-fixed bread or price-fixed drugs or price-fixed eggs, the parens patriae authority will not be meaningful.

The major issues that have been raised by the other witnesses before this committee involve constitutional problems and what I would call administrative problems.

Again, on the constitutional issue, I think one point—and this has been raised by Mr. Lerman in his statement, Professor Handler, and Mr. Shapiro—one point to make is that the issue was not decided in the *Eisen* case or, what is familiarly called, *Eisen III*.

It is true there is language in *Eisen III* that suggests that, what they call fluid class recovery, may raise problems under the due process clause.

I would make a couple of points. In the first place, that is not what *Eisen III* really decided, which was that rule 23 did not authorize this type of recovery. It was not necessary to reach any constitutional question.

Moreover, commentators have criticized that comment as wrong as well as unnecessary.

Third, there is subsequent language in the opinion that says Congress has the power to fashion a remedy. That certainly is somewhat inconsistent with the statement about due process.

And fourth, when the Supreme Court took the case, they did not rule on that issue, and that portion of the second circuit's opinion was vacated.

So the issue was not decided in the *Eisen* case.

Moreover, to the extent that these persons imply, the issue has been decided, it implies that there exists a body of case law that in fact does not exist.

In my limited research, I found three cases that dealt with this particular issue. One was *Eisen*, one was another case that relied completely on *Eisen* saying nothing else, and the other was in Judge Lord's opinion in the *Antibiotics* case, which has full analysis of the issue. And most of the commentators think that it would not be unconstitutional to allow recovery of aggregate damages.

Finally—and I think this is the most important thing about the entire aspect of the bill, and particularly aggregate damages—the arguments about unconstitutionality and the arguments about the administrative problems, and this huge smokescreen about the passing-on defense, which makes the whole testimony look like a debate on the *Hanover Shoe* case, fails to really understand what the effect of this bill on substantive antitrust law.

This is not a bill that says State attorneys general can sue to enforce the claims of private individuals. What this law says is that the State is damaged under the Federal antitrust laws when consumers who live there pay more because of price fixing. It is the State who is injured.

If I can just read a brief portion of my testimony because I think that this is the most important and very confusing—I am reading from page 28, the bottom of page 28 of my statement.[1]

Moreover, these arguments of unconstitutionality are even weaker in the context of parens patriae actions under Section 4(c) than they are in the rule 23 class action context. The claim that section 4(c) involves a denial of due process and right to jury trial fails to appreciate the substantive effect on title IV. [On antitrust law.] Section 4(c) changes substantive antitrust law. It substitutes the claim of the State as parens patriae in place of individual claims, except people who decide to opt out under subsection (b)(2). Not only does Section 4(c) authorize the States to sue as parens patriae, but it is no longer a question of individual liability. Antitrust violators are now liable to the State, who acts in place of its citizens. The state, of course, has no right to keep them out.

They receive it in a sense as a trustee, and they have to pay out the claims that are made against the funds, the rest going to the general welfare.

All these arguments about unconstitutionality—and passing on—fail to realize that we are not talking about the State attorney general suing to enforce an individual claim. This bill changes the substantive antitrust law. It says that when you have people who live in your State that have to pay more because of price fixing, the State is injured. Except Congress is going to say that the State does not get to keep all that money. It has to give it to people who can come in and show they bought something and were damaged.

Now, there just seems to me no doubt that Congress has the constitutional power to do that; both because of the broad power it has under the commerce clause, and because of the demise of substantive due process.

I can deal briefly with some of the administrative problems that have been raised regarding the passing-on defense. In the first place, many of these problems are eliminated if you limit classes to natural persons, individual consumers. Second, they only exist where the consumer was not a direct purchaser. So it should be clear we are not talking about all the cases.

The notion of duplicative recovery oversimplifies completely how pricing works in an industry. Take a case where we have a chain of distribution where the price fixer sells to the wholesaler, who sells to the retailer, who sells to the consumer. In the first place, all this argument about passing-on, seems to assume that either everything is passed on or everything is absorbed. But that is just not true.

As a matter of theoretical economics, everything will be passed on if demand is totally inelastic; everything will be absorbed if it is totally elastic. But neither is likely to be the case.

In most cases, part of the overcharge will be absorbed by whomever buys directly, and part will be passed on.

Second, as a practical matter, it fails to understand how consumers are additionally injured by the way in which firms price their products.

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[1] See p. 498.

Let me use a simple example. If bread producers fix the price of bread, and let us say they are selling it at 10 cents a loaf to a store—this is not realistic in terms of the general prices. So maybe we should talk about widgets as law professors like to talk about rather than the real things like bread—but if they are selling widgets at 10 cents to the store, and they price fix it and they raise it to 12 cents, and the store marks it up 40 percent. The store was selling it at 14 cents before. They just do not add 2 cents on and sell it at 16 cents. They mark up the new price 40 percent. So, in effect, they are selling it at 17 cents.

Thus because stores use percentage markup, not only does the consumer pay part of the original overcharge, but he pays an extra amount because the store marks up a percentage on the price they have been charged. In many cases they just do not simply add on arithmetically the amount of the overcharge.

So this whole business about passing-on sort of obfuscates the issue, and oversimplifies it.

I think Professor Handler's and Mr. Shapiro's arguments do the same thing, and they just simply misunderstand what this bill does as a matter of substantive antitrust law.

Mr. Shapiro's statement is an interesting treatise on the law regarding the right of consumers to recover under existing section 4. But that is not what this bill deals with. This is a new section of the antitrust law.

It is important for the bill to make clear, as well as the report, that the right of the State attorney general to recover does not depend on whether the individuals who can claim against the fund could sue under existing section 4.

The attorney general, when he sues, should not be burdened by the claims that would be raised under the passing-on defense, and some of the more perverse notions of standing like the *Mangano* decision. And he should not have to prove that the people who can later come in and claim against this fund independently would have had standing to sue. That is not what this bill says.

This bill says the State is injured when people who live there have to pay more because of price fixing. And it removes these problems.

If it is felt that perhaps the bill does not make that clear enough since there has been some confusion, I would be happy, again, to assist the staff with whatever their desire is in redrafting.

I will say, in conclusion, that I do not mean to imply, Senator Hart, that there will never be a problem of determining how much injury there has been to the State under a parens patriae action.

But it seems to me this: That the issue before Congress is whether the problems are so overwhelming that you should not give them to the courts.

Unlike, apparently, many of the witnesses who have testified here, I have a great deal of confidence that the courts can deal with many of these problems. They are not so overwhelming. After all, the per se rule is judicially created, the rule of reason is judicially created, the notions of target area and direct/indirect.

The courts have shown a great deal of capacity, in antitrust and other areas, to work out problems. I think that the burden of proof ought to be on the defendant in any case, if we have a sale to the whole-

saler and then to the retailer and then to the consumer, to come in and say: "Your Honor, the State attorney general here is trying to collect for damage that was not caused to his State. I can show you that, in fact, part of that overcharge was borne by the retailer, and it should not be recovered by the attorney general." All that is required constitutionally is that the defendant be given his day in court on that issue to show that the State was not injured. And if he can prove that the attorney general is trying to recover too much money, fine, let him prove it. But the burden of proof ought to be on him.

And to the extent that it cannot be proven clearly, what you then have is a choice between overcompensation to people who have been injured, or underdeterrence to antitrust violators.

And the answer that Congress and the courts have given for years is rather clear: The choice you make is to overcompensate rather than underdeter. That is the whole theory behind treble-damage actions. Language can be found in numerous antitrust opinions supporting that. And I have a great deal of confidence that the courts can work out whatever problems may exist regarding problems of measurement and duplicative recovery.

But I do not want to make it seem that it is just simply, you waltz in and you pull out your adding machine, and you just say: "It is $1 million. Pay it over."

Defendents are there. They can raise their defenses. They can call their witnesses. They can try to prove whatever they think is relevant. If they cannot convince the judge, the policy issue then is one between overcompensation or underdeterrence. And I think there, in the antitrust tradition, the answer is clear.

I hope I have not taken more than my proverbial 10 minutes, but I wanted to deal with some matters that were not dealt with in my prepared statement.

I would be glad to answer whatever questions that you may have.

Senator HART. Your statement, whatever the time is, is useful, and your observations, especially as they reminded us that this is a new antitrust action under section 4 of the Clayton Act. I think it is a very good record. Thank you.

Mr. O'Leary?

Mr. O'LEARY. Professor, do you have a copy of the bill there with you?

Professor ROSE. Yes; I do.

Mr. O'LEARY. If you will turn to page 19 of the bill, and go down to line 12.

Now, I gather what you are telling us is that perhaps we did a poor job of draftsmanship, in effect, in the outset, and we could have avoided a lot of confusion if we had just said something as follows: delete "as parens patriae", and just say "on behalf of", and insert "natural" between "the" and "persons."

And the legislative history would make clear that means consumers or individual consumers residing in that State with respect to damages sustained from antitrust violations.

And then after that, just delete everything else in that subsection 1.

Professor ROSE. I do not really think, Mr. O'Leary, that the draftsmanship was as poor as you inferred. I had no trouble understanding, if you read the cases, exactly what the committee intended.

I think the fault may lie more with those who were, hopefully, misunderstanding what the committee intended.

Let me say this: I think that the words "on behalf of" you suggest, gives me some trouble. Obviously, it is difficult to draft orally between us.

I would give several caveats, and I would be happy to draft something for you. I would not use the word "injury" regarding consumers, first of all, because it has an established meaning under section 4, that would permit a court to say "Well, injury, that brings in this whole problem of standing."

I would talk about "damage" to consumers. I would make it clear that the State is not so much acting on behalf of consumers, but that Congress is declaring that a State is injured under the antitrust laws when people who live there are damaged because of price fixing, and that the State may secure monetary and other relief, and that the claim is one of the State, but that it has to pay part of the money over.

I think that you want to avoid using the word "injury" when you talk about the individuals, because it brings back this whole standing issue that Mr. Shapiro has dealt with in such length in his statement.

I think there are other ways that the language can be clarified, as well as in the report, to make it clear that—as it was perfectly clear to me—I think if you read the cases, it is quite clear exactly what Congress is intending to do here—and to make it clear that it is not the State suing as, sort of, the lawyer, because individuals cannot afford to—what Congress is declaring is, it is the State who was injured, except Congress is also declaring that you cannot keep all this money for yourself.

I suppose if Congress wanted to, it could say, "State, you can keep everything," but it has not chosen to do that. It has chosen to let private individuals come in and make a claim.

In terms of using the word "parens patriae" itself, there are some risks, because it has a common law connotation. For example, a court might try to impose some substantiality requirement, and say, "Mr. Attorney General, in this case you have not shown that enough people have been injured."

And it was traditional under parens patriae that you had to show that a lot of people were hurt. And I see no intent of Congress to adopt that notion, and I do not think they intended it merely because they used the word "parens patriae."

But I would be happy to send to you or Mr. Nash some language, rather than try to do it back and forth between us here, that specifically tries to clarify this.

Mr. O'Leary. A lot of arguments which have been made in the context of rule 23 class actions simply are not relevant, is, basically, what you are telling us with respect to this issue of aggregating damages, and whether the defendant has the right to defend against individual consumers claims.

Professor Rose. Yes, when you reach that, it is simply a question of whether Congress has the power to declare that a State is injured, when people who live there have to pay more because of price fixing.

There is no doubt in my mind about the answer to that question. And all the arguments made by Prof. Handler and others may be very appropriate regarding statutory interpretation of existing sec-

tion 4, or questions that arise under rule 23, but that is not what this is about.

This bill is being proposed because those things did not work. And I must admit that under rule 23 sometimes the cases do become unmanageable.

I would not say that they are always manageable. Some of the private attorneys have sought to bring very large class actions, and it is understandable the courts have shied away.

But this is a whole new ball game. This is a new substantive antitrust claim. And I think it is clear, but I certainly think it would not hurt to make it clearer, so some court does not have the opportunity to undo a great deal of what I think Congress intends to do here.

Mr. O'LEARY. With respect to that question of congressional power, you speak, at one portion of your statement, about the remedies provided under the trademark and patent laws.

Would you expand on that?

Professor ROSE. Actually, I cannot remember which one of them, but I think the trademark laws are a much better example.

There are provisions for violations of the trademark laws, where, in effect, the violator is called for an accounting of the illegal profits, without requiring proof of individual claims.

That, to me is precedent. I may have the two reversed, but I think that the trademark example is much more clearly in point than the patent example.

Mr. O'LEARY. Thank you. I have no further questions, Mr. Chairman.

Senator HART. Mr. Chumbris?

Mr. CHUMBRIS. Thank you, Mr. Chairman.

First, I was telling the chairman earlier that, although I might not agree with everything that you have stated in your paper, I do appreciate the manner in which you attacked this problem. What you did is, you took the position of relating both sides of the issue, so the reader of the record will learn immediately what the key issue is, and then you take it and cite cases, and you distinguish cases, then you come to your own conclusions.

Some people may agree with you on some of your conclusions, some may agree with all of them, some may disagree with some. But the manner in which you presented the paper, as far as a subcommittee that goes into the subject, I think it is a good way to approach this subject.

Professor ROSE. Thank you very much.

Mr. CHUMBRIS. Now, on one point I want to——

Professor ROSE. Now, you want to disagree with me.

Mr. CHUMBRIS. What is that?

Professor ROSE. Now, you are going to disagree with me on my conclusions.

Mr. CHUMBRIS. No, you just——

Senator HART. Mr. Chumbris did comment to me as you came forward that the paper was extremely well balanced.

Professor ROSE. Thank you very much.

Mr. CHUMBRIS. On the colloquy that you had with Mr. O'Leary about the damages—now, let us take this recent decision by the U.S. Supreme Court affecting labor unions. I have not had a chance to

read the decision. I am only commenting from what I read in the paper—where the Supreme Court came to the conclusion that the labor unions could have violated the antitrust laws by requiring that subcontractor's employees must be members of the union, and by barring nonunion workers of subcontractors, they had violated antitrust laws.

And let us assume there is a particular product that is manufactured. And because of the fact that the union borrowed subcontractors into that product, which, because of nonunion wages and other factors, could have built into that product at less cost than would have resulted if every subcontractor and all the employees had to be union employees, then, on that basis, a union then could be subject to a suit.

Professor Rose. Correct.

Mr. Chumbris. Correct, right?

Professor Rose. As well as whomever else they conspired with.

Mr. Chumbris. Right. And take the old cases, where the Supreme Court held that a union that conspires with a business on a matter, and they found it to be outside of the exemption that they had from the antitrust laws, that they were also responsible. That type of case, if it should occur again, would also be subject to a lawsuit in parens patriae.

Professor Rose. Well, I assume that, insofar as they are not immune from the antitrust laws, the unions are suitable as defendants in antitrust actions, as are corporations.

Mr. Chumbris. Thus far the whole thrust of the testimony has been that some businessman may be hurt if this bill becomes law in the form that it has been submitted. It could also include labor unions as well.

Professor Rose. Well, sure. The bill does not distinguish as to who may be sued, or whether any antitrust violations are not covered by the notion of parens patriae.

But I think one thing is important to understand, and it reiterates the faith I have in the courts to solve problems effectively.

When a State attorney general goes into court on something that is more bizarre in the antitrust world than a simple price-fixing case, he has to prove that the State was injured—first, that the antitrust laws were violated, and that the State was injured, and the amount of that injury.

Courts have been sensitive to all the kinds of problems that arise in that context, and I do not think it is fair to assume that the courts are just going to lay down and let States collect anything they want for everything that happens.

He has important burdens of proof. And I think those issues will be dealt with adequately.

Mr. Chumbris. Now, yesterday I heard of the study that has been made, and I have not been able to get a hold of it. And if I get a hold of it in time, Mr. Chairman, I would like to submit it for the record.

A survey was made of the businesses which have been involved in price fixing. And the surprising thing is, that the record shows that a great proportion of these—now, I do not want the record to be misled and I will correct it in the record as we find out what it is—but it made it appear that many of the violators in this price fixing were small business people.

And if that is so, then a settlement that could be as large as a $195 million settlement that we had in one of the cases that was presented to us during this hearing could literally wipe out a number of small business people who may have been involved, because $195 million would wipe out a great percentage of the business people in this country, which is something, I think, that Congress, from a social and political approach, would have to look into if that study is in the manner that it was presented to me.

Professor ROSE. I would respond, Mr. Chumbris, very briefly with this comment on that.

Obviously, at some point you cannot just argue deterrent effect ad infinitum, but it seems to me two of the most important judicially created doctrines—again, I come back to the genius of the courts—have related to the sensitivity to undue liability.

I refer in my statement to tort law and to the notions of proximate cause, and in contracts, to *Hadley* v. *Baxendale*, the contemplation rule.

Courts are sensitive to this problem. Courts are going to make sure that there is a proper balance between deterrence and undue liability.

And I really think that is the kind of thing that Congress cannot handle in gross. It can just be assured and confident that courts can handle it. And I have faith that they will. They have in all areas of the law. So I really think that is a question for the courts to resolve and not a reason to withhold the authority from the courts by Congress.

Mr. CHUMBRIS. And, if I recall correctly, there was a treatise written by an eminent scholar. He made a study of the cases before the FTC. And the treatise shows that of the studies that were made relating to violations of the Robinson-Patman Act at the FTC, show few of them involved real large business.

Most people assumed that they would be the ones. But it involved small and medium sized businesses. And that is why I particularly picked on this item.

Professor ROSE. I think that it is a problem. I think the courts can handle it. But I think the problem in antitrust is that it is profitable to fix prices, and it will require action by Congress to make it unprofitable, and this bill is very important to that end.

Mr. CHUMBRIS. Thank you. I received a little note that you have to get out of town fast.

Senator HART. Only to catch his bus to get to the airport.

Professor ROSE. I will make it. I am safe now.

Senator HART. Thank you very much.

Professor ROSE. Thank you for the opportunity to appear.

[The prepared statement of Mr. Rose follows. Testimony resumes on p. 499.]

PREPARED STATEMENT OF JONATHAN ROSE, PROFESSOR OF LAW, COLLEGE OF LAW, ARIZONA STATE UNIVERSITY, TEMPE, ARIZ.

PARENS PATRIAE—A NEEDED AND DESIRABLE ANTITRUST IMPROVEMENT

"When you're doing $30-million a year and stand to gain $3-million by fixing prices, a $30,000 fine doesn't mean much. Face it, most of us would be willing to spend 30 days in jail to make a few extra million dollars." Former vice-president, Phoenix bakery firm indicted for price fixing. Business Week, June 2, 1975, p. 48.

Mr. Chairman and members of the subcommittee, I am honored to have been invited by this Committee to testify on S. 1284, the Antitrust Improvements

Act of 1975. I have been asked by the Committee to direct my remarks to Title IV—Parens Patriae. There is no doubt that this is a very important and timely topic. My conclusion is based not only on my years as a practitioner and teacher of antitrust, but on my role as special antitrust consultant to the State of Arizona for the past several years. My testimony will focus specifically on the following points: 1) the general need and rationale for parens patriae authority; 2) some of the problems, especially constitutional ones, that may be raised by permitting a state to sue in parens patriae for damages to its individual citizens or general economy; and 3) some of the problems, again including possible constitutional ones, that may be raised by authorizing recovery of aggregate damages in such parens patriae suits.

I. THE GENERAL NEED AND RATIONALE FOR PARENS PATRIAE AUTHORITY

Section 401 of S. 1284, proposed section 4C of the Clayton Act, would grant broad rights to state Attorneys General to sue in parens patriae for damages to the individual citizens and general economy of their respective states and to sue as representative of a class of individual citizens or on behalf of poticical subdivisions of their respective states. Section 4C provides a set of procedures governing the enforcement of this new right. These procedures include the requirement that the state Attorney General give notice of any parens patriae action and that persons having individual claims have an opportunity to opt out from such actions or otherwise be bound by the judgment in the parens patriae action. It also provides for the recovery of aggregate damages in such actions dispensing with separate proof of individual claims. In general Title IV of S. 1284 would work major changes in this area of antitrust law that are both needed and sound.

The federal government, of course, is not the only enforcer of the federal antitrust laws although it may be the single most important institution. It has been long recognized that private parties play an important role in federal antitrust enforcement. In fact, they are sometimes referred to as "private attorneys general." [1] While private parties may seek injunctive relief, the most important right that they have under the federal antitrust laws is the right to sue for treble damages. This right increases substantially the cost of antitrust violations and therefore provides substantial deterrent effect as well as complementing the limited resources of the federal government. For these reasons the federal antitrust laws contain numerous incentives for private enforcement. And, in fact, private antitrust enforcement has increased substantially in recent years.[2]

Despite these developments a problem has arisen regarding certain kinds of injuries resulting from antitrust violations. In cases involving injuries to consumers, there may be little individual incentive to sue. As has been frequently pointed out,[3] this lack of individual interest results primarily from the smallness of the claims and the cost of litigation. Many leading commentators thought that class actions under Rule 23 were the solution to this problem,[4] although not all practitioners agreed.[5]

In pursuing class actions, however, many problems developed. In the first place, consumers had to meet the normal antitrust requirements of standing to sue. While some courts found that ultimate consumers did have standing to sue,[6] many courts denied standing to ultimate consumers, perhaps partially out of a desire to avoid the difficult problems that these class action suits raised.[7] Second,

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[1] *See, e.g.*, Hawaii v. Standard Oil of California, 405 U.S. 251, 262, 92 S. Ct. 885, 891 (1972).

[2] *See* R. Posner, Antitrust: Cases, Economic Notes And Other Materials 138 (1974).

[3] *See, e.g.*, Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224 (1968); In Re Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971): State of Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969); C. Wright & A. Miller, 7A Federal Practice and Procedure § 1782, at pp. 101–02 (1972); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 391 (1967).

[4] *See* C. Wright & A. Miller, 7A Federal Practice and Procedure § 1782, at 101–02 (1972); Miller, *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501, 502–03 (1971); Kaplan, *A Prefatory Note*, 10 B.C. Indus. & Com. L. Rev. 497 (1969). *See also*, Manual for Complex Litigation § 1.45, at p. 37 (1973). *See generally* Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L. Rev. 433 (1960); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684 (1941).

[5] *See, e.g.*, Handler, *The Shift from Substantive to Procedural Innovation in Antitrust Suits—the 23rd Annual Antitrust Review*, 71 Colum. L. Rev. 1, 4–17 (1971).

[6] *See, e.g.*, Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973).

[7] *See e.g.*, In Re Multidistrict Vehicle Air Pollution, 481 F. 2d 122 (9th Cir. 1973); United Egg Producers v. Bauer International Corp., 312 F. Supp. 319 (S.D.N.Y. 1970); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D.Pa. 1970), *aff'd per curium sub nom* Mangano v. American Radiator & Standard Sanitary Corp., 438 F. 2d 1187 (3rd Cir. 1971). For a criticism of denial of standing to ultimate consumers see Comment, *Mangano and Ultimate-Consumer Standing: The Misuse of the Hanover Doctrine*, 72 Colum. L. Rev. 394 (1972).

often consumers had difficulty meeting the requirements of Rule 23. The argel size of the classes frequently led courts to hold that the classes were unmanageable, with particular reference to the problems of giving notice and the problem of computing and distributing damages.[8] Moreover, these consumers were sometimes further disadvantaged as some believed that their attorneys were overzealous or receiving fees that were larger than desirable.[9]

As class actions by consumers and these ensuing problems began to accelerate much attention focused on the *Eisen* cases in the Second Circuit. The fears of consumers were soon realized as they suffered a stunning defeat in the Second Circuit's last opinion, commonly known as *Eisen III*,[10] which reflected a strong judicial antipathy and hostility toward antitrust class actions on behalf of consumers, suggesting even that they were a form of "legalized blackmail." The final coup de grace was rendered to consumers when the Supreme Court affirmed the Second Circuit's decision in *Eisen III*. Although the Supreme Court's opinion was less outspoken and did not touch upon all the issues dealt with by the Second Circuit, its rejection of the innovative procedures developed by Judge Tyler cast much doubt on the viability of class actions as a remedy for large groups of consumers injured by antitrust violations. Moreover, the aftermath of *Eisen* may be even bleaker, if possible, from the standpoint of consumers.

Some judges apparently needed little encouragement or authority, even to the point of disregarding Supreme Court decisions on substantive antitrust law, for denying a forum to antitrust consumer class actions.[11] Moreover, a new hurdle has emerged for consumers. They may have some difficulties retaining attorneys since the latter may now have to fear the possibility of ethical sanctions as the result of pursuing class actions.[12]

On the other hand, whatever one may think about the Supreme Court and Second Circuit decisions in the *Eisen* case, extremely large consumer class actions do appear to present problems of manageability; and perhaps Rule 23 is not the best vehicle for handling the antitrust claims of consumers numbering in the many millions, even perhaps all the consumers in the United States of a particular product.[13] As a leading commentator has pointed out, the very same reasons that appear to make Rule 23 attractive as a remedy for consumers also lead judges to conclude that it is unworkable.[14] As a result, many commentators have concluded that class actions have been ineffective in vindicating the antitrust claims of consumers.[15]

During this same period when private antitrust enforcement was growing, the interest of state Attorneys General in antitrust enforcement was increasing also. This manifested itself primarily in two ways. First, enforcement of state antitrust laws was characterized by more widespread and effective development. While historically only a few states had had active antitrust enforcement programs, now many states began to enact antitrust laws or revise their antiquated laws, and state Attorneys General began to engage in vigorous prosecution, instituting many law suits. Second, states assumed an important role as plaintiffs under the federal antitrust laws. Motivated initially by their own injuries and proprietary interests, states soon came to play a larger role as plaintiffs in class actions representing political subdivisions and their injured citizens. Conscious of their role as protector of their citizen consumers, it was not unlikely that, in this context, state Attorneys General would attempt to use the common law notion of parens patriae as a way of further increasing their efforts in this area. However, their

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[8] *See, e.g.*, Eisen v. Carlisle & Jacquelin, 479 F. 2d 1005 (2d Cir. 1973), *aff'd*, 417 U.S. 156, 94 S. Ct. 2140 (1974); Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973); Philadelphia v. American Oil Co. 53 F.R.D. 45, 71-74 (D.N.J. 1971); Hackett v. General Host Corp., 1972 CCH Trade Cas. ¶ 73879 (E.D.Pa. 1970).

[9] *See* In re Hotel Telephone Charges, 500 F. 2d 86, 91 (9th Cir. 1974); Pollock, *Class Actions Reconsidered: Theory and Practice under Amended Rule 23*, 28 Bus. Lawyer 741 (1973); Handler, supra note 5.

[10] Eisen v. Carlisle & Jacquelin, 479 F. 2d 1005 (2nd Cir. 1973).

[11] *See* Kline v. Coldwell, Banker and Co., 508 F. 2d 226 (9th Cir. 1974). According to one commentator, "This opinion expresses an antipathy to large class actions that probably surpasses even that expressed by the Second Circuit in the *Eisen III* decision of 1973." 696 BNA Antitrust & Trade Regulation Report A-18 (January 14, 1975).

[12] *See* Kline v. Coldwell, Banker and Co., 508 F. 2d 226, 236-39 (9th Cir. (1974) (Duniway, J. concurring).

[13] *See, e.g.*, In re Hotel Telephone Charges, 500 F. 2d 86 (9th Cir. 1974) (40 million); Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973) (30 to 40 million—all purchasers of GM automobiles); United Egg Producers v. Bauer International Corp., 312 F. Supp. 319 (S.D.N.Y. 1970) (all consumers of eggs in the United States).

[14] *See* C. Wright & A. Miller, 7A Federal Practice and Procedure § 1782, at pp. 101-02 (1972).

[15] *See, e.g.*, C. Wright & A. Miller, 7A Federal Practice and Procedure § 1782, at p. 98 (1972); Comment, *Managability of Notice and Damage Calculation in Consumer Class Actions*, 70 Mich. L. Rev. 338 (1971).

hopes, as well as those of consumers, were soon disappointed as the courts decided that the common law notion of parens patriae did not extend to these types of cases.[16]

The problems of consumers injured by antitrust violations were thus magnified. They were denied class actions under Rule 23 as an effective remedy and they were denied the right to have their Attorneys General act on their behalf as parens patriae. One must admit that there is a certain irony in the *Hawaii* decision, which, in denying the right of state Attorneys General to sue as parens patriae, suggests that class actions under Rule 23 are a preferable and effective remedy for the problem. Two years later, of course, the Supreme Court rendered its decision in the *Eisen* case. In a sense, the decisions in the *Hawaii* and *Eisen* cases may be inconsistent.

As a result, consumers, having gone "from pillar to post" in search of a remedy, have come up empty handed. Moreover, antitrust violators—those who injure a large number of small consumers—have obtained a certain amount of immunity. The latter unfortunately diminishes the deterrent effect of the antitrust laws and undermines the Congressional purpose in affording private treble damage relief. In fact, a certain dilemma, one not without irony, has developed: the greater the number of persons who are injured by an antitrust violation, the less chance the transgressors—normally price fixers—have of being effectively sued by those injured, and the greater chance they have of retaining the profits of their illegal activities. Thus, a statutory right of state Attorneys General to sue in parens patriae emerges as the leading solution to these problems. The discussion reflects no doubt as to the need for a remedy and the insufficiency of past attempts to find one. Congress may be the last "pillar or post" to which consumers and their Attorneys General can look for a remedy. It is for all these reasons that I strongly support the parens patriae concept in Title IV of S. 1284.

II. NOTICE BY PUBLICATION—CONSTITUTIONAL PROBLEMS

Section 4(C)(b) provides in subsection (1) that when a state's Attorney General brings a parens patriae suit, he shall give notice of such suit by publication rather than individualized notice. Subsection (2) gives any person having a claim an opportunity to opt out of the parens patriae suit by notifying the court within 30 days after the publication of the notice. A failure to opt out will bar actions for individual claims and the judgment in the parens patriae suit will be res judicata. Questions have been raised regarding the constitutional sufficiency of the notice provision provided for in this section. The discussion of this issue will be in two parts: (1) the constitutional sufficiency of notice by publication rather than individual notice in parens patriae actions in general; and (2) particular problems raised by § 4(C)(b) and possible amendments to that section.

A. Notice by publication in parens patriae actions generally

The first point to be made is that the Supreme Court has not disposed of this issue in the *Eisen* case. First, the Supreme Court's decision is clearly an interpretation of the requirements of Rule 23 although both the opinion and Rule 23 have constitutional overtones. In responding to the argument that individual notice to identifiable class members was discretionary, the Court said, "It is, rather, an unambiguous requirement of Rule 23." Second, as the later discussion will indicate, there are important differences that bear on constitutional questions between parens patriae suits under section 4C, and class actions under Rule 23, The problem dealt with by the Supreme Court in *Eisen*.[16a] Moreover, realistically it is difficult to divorce the holdings of the Supreme Court and the Court of Appeals in *Eisen* from the problems of large consumer class actions under Rule 23 discussed above. Perhaps this is just another way of saying that the problems presented in those cases are not necessarily presented, or even if presented, as serious, with parens patriae actions. Therefore, any discussion of the constitutional issues regarding notice by publication must proceed on the basis of the Supreme Court opinions that have dealt directly with that issue.

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[16] The leading decisions were Hawaii v. Standard Oil of California, 405 U.S. 251, 92 S. Ct. 885 (1972) and California v. Frito-Lay, Inc., 474 F. 2d 774 (9th Cir. 1973), *cert denied*, 412 U.S. 908 (1973).

[16a] For a good discussion of the constitutional questions regarding notice under Rule 23 and the meaning of the District and Circuit Court opinions in *Eisen*, see Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 Mich. L. Rev. 338, 353-60 (1971).

The leading Supreme Court case dealing with the constitutionality of notice by publication is *Mullane* v. *The Central Hanover Bank & Trust Co.*[17] In *Mullane*, the issue was the constitutional sufficiency of notice by publication to beneficiaries on a judicial settlement of accounts by a trustee of a common trust fund established under the New York Banking Law. The decree in the judicial settlement of accounts was binding and conclusive on any matter set forth in the account upon anyone having an interest in the common fund or trust. The Court held that notice by publication was constitutional as to beneficiaries whose interests or address were unknown, or could not be ascertained with due diligence. The Court further held that notice by publication was unconstitutional as to beneficiaries whose identity or address were known. In this opinion, the Supreme Court did not attempt to lay down any strict test for determining the constitutionality of notice by publication. Instead, it said that the test was a flexible and practical one that depended upon the facts and peculiarities of the particular case.

"The Court has not committed itself to any formula achieving a balance between those interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. . . . An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such a nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance. . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the Constitutional requirements are satisfied." [17a]

As Professor Kaplan, now Judge Kaplan, stated simply, "Notice which is fair in the circumstances of the case is a constitutional requirement." [17b] Thus, *Mullane* and the subsequent cases as well as the leading commentators make it clear that notice by publication can be constitutional and the only issue is whether it is so under the circumstances of the particular case.

"Due regard for the practicalities and peculiarities of" parens patriae suits on behalf of injured consumers strongly suggests that generally, in such cases, notice by publication is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the actions;" and is therefore constitutional. Several factors support this conclusion. As noted above, the individual injury in these cases is often very small. This means, of course, that there is a substantially less likelihood of individual suits and a correspondingly smaller desire to opt out of any suit brought in parens patriae on the individual's behalf. As many commentators have noted, this fact diminishes the importance and rationale of individual notice.[18] As Professor Kaplan noted, the individual interest in controlling the litigation "may be no more than theoretical where the individual stakes are so small as to make a separate action impracticable." [19] Moreover, in the case of consumers, many of the claims are not only small, but very similar, giving a certain cohesiveness and identity to the group. Second, the very large size of the class, the nature of the injured parties and their relationship to the state Attorney General may make it very difficult for him to ascertain their identities and give individual notice. In *Mullane*, the Supreme Court said:

"This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus, it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree for foreclosing their rights.

"Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come within this category. As to them statutory notice is sufficient however great the odds that publication will never

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[17] 339 U.S. 306, 70 S. Ct. 652 (1950). *See also* Schroeder v. City of New York, 371 U.S. 208, 83 Sup. Ct. 279 (1962); Walker v. City of Hutchinson, 352 U.S. 112, 77 Sup. Ct. 200 (1956).

[17a] *Id.* at 314–15 (citations omitted).

[17b] See Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 396 (1967). For a thorough discussion of the constitutionality of notice by publication, see C. Wright & A. Miller, 7A Federal Practice and Procedure § 1786 (1972); Note, *Constitutional and Statutory Requirements of Notice Under Rule 23(C)(2)*, 10 B. C. Indus. & Com. L. Rev. 571 (1969).

[18] *See* C. Wright & A. Miller, 7A Federal Practice and Procedure § 1786 (1972); Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 Harv. L. Rev. 426, 437 (1973). *See also* In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 282 (S.D.N.Y. 1971).

[19] *See* Kaplan, *supra* note 17, at 391.

reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable.

"Nor do we consider it unreasonable for the state to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in the course of business come to the knowledge of the common trustee. Whatever searches may be required in another situation under ordinary standards of diligence, in view of the character of the proceedings and the nature of the interests here involved we think them unnecessary. We recognize the practical difficulties in cost that would be attendant upon frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral; and we have no doubt that such impractical and extended searches are not required in the name of due process.[20]"

The burden of ascertainment and identification of injured individuals that would be put upon state Attorneys General seems quite similar to the plight of the common fund trustees in *Mullane*. In a subsequent case the Supreme Court, applying *Mullane*, indicated that individual notice was required only where the persons names and addresses were known or "very easily ascertainable." [21] While there may be some situations, such as that in *Eisen*, where records are kept and persons names and addresses can be ascertained without undue difficulty, this is not the usual situation in cases involving many consumers of a particular product. In most such instances it seems highly doubtful that the names and addresses of injured consumers will be either known to or very easily ascertainable by a state Attorney General. Moreover these difficulties are aggravated by the cost of individual notice. While state governments are not in as bad a position as individual consumers, the cost of individual notice can be very great. In *Eisen* it would have cost $315,900 to give individual notice. There is no doubt that this type of a financial burden would strain the already meager financial position of state governments. The cost of individual notice is thus another factor that strengthens the case for notice by publication.[22] In fact, at a certain point a requirement of individual notice becomes self defeating, for due process becomes less of a safeguard for protecting the interests of absent persons and more of a bar to effective relief to numerous parties.[23] As Judge Weinstein stated in an early influential article regarding class actions," . . . Necessity makes due process." [23a]

While a good case for the constitutionality of notice by publication can be made on the basis of the above factors, another factor exists that, not only greatly strengthens the case for constitutionality, but serves to distinguish the parens patriae situation from the Rule 23 cases. That factor is the presence of the state Attorney General as the plaintiff in a parens patriae action. This fact has two implications for constitutionality. First it bears upon the effectiveness of the notice; and second it insures adequacy of representation of the absent injured consumers. With regard to the first, it would seem that the presence of the Attorney General would maximize the effectiveness of notice by publication. A state Attorney General is an elected official and a public figure. He has the ability to command the attention of many people. He has great and easy access to the newspapers, the source of publication; and the press and the public pay attention to what he has to say. While courts have been properly concerned with the effectiveness of notice by publication, those problems would seem to be substantially less when it is a state Attorney General who is giving notice by publication than when it is a private party. With regard to the second factor, adequacy of representation, it is difficult to conceive of a better representative of consumers

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[20] 339 U.S. at 317–18.

[21] Schroeder v. The City of New York, 371 U.S. 208, 212–13, 83 S. Ct. 279, 282 (1962).

[22] See R. Posner Antitrust: Cases, Economic Notes and Other Marerials 175 (1974); C. Wright & A. Miller 7A Federal Practice and Procedure § 1786 (1972); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); Booth v. General Dynamics Corp., 264 F. Supp. 465 (N.D. Ill. 1967).

[23] "It would be ironic were the rigors of due process, designed to protect the interests of a class, [used] to deny effective relief to that class. *Mullane* suggests that due process cannot be evaluated so mechanically; that, to the contrary, only by weighing the various interests at stake, can a court in a given case develop procedures that will safeguard the interests of all parties." Note, *Managing the Class Action: Eisen v. Carlisle. & Jacquelin*, 87 Harv. L. Rev. 426, 440 (1973).

[23a] Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L. Rev. 433, 334 (1960)

within a state than the Attorney General of that state, a fact noted by several courts and commentators.[24]

A state Attorney General has the sworn duty of carrying out the state's obligation to protect the health and welfare of its citizens. Moreover, he has the specific duty to enforce the various state laws relating to consumer protection. Finally he is an elected official and is accountable to the public that he serves at the ballot box on election day. Finally, unlike a private attorney, he has no financial interests in the litigation.[25] Moreover, in this connection, the presence of the Attorney General rather than a private attorney eliminates the possibility that an attorney might favor himself or some clients in the class and "sell out" other members of the class, a problem that troubled some courts faced with large class actions.[26] In short, it would not be unfair to state that the presence of a state Attorney General as plaintiff in the parens patriae action guarantees, as a matter of law, adequacy of representation.

While section 4C does not expressly refer to adequacy of representation, it is implicit in the notion of parens patriae suits for the reasons stated above. Moreover, it is a very important factor in the analysis of the constitutionality of notice by publication.[27] Moreover, it has been suggested that in terms of protecting the interests of absent parties adequacy of representation is more important from the standpoint of due process than notice.[27a] In *Hansberry* v. *Lee*, the Supreme Court said that the requirements of due process were met when there was a "procedure adopted, [that] fairly insures the protection of interests of absent parties who are to be bound by it."[28] In this connection it is important to point out that the whole procedure that section 4C sets up is relevant to determining the constitutionality of notice by publication.[28a] Thus the elaborate procedures set out in section 4(C)(c) further strengthen the case for constitutionality. If the Attorney General is successful in his suit, there is a statutory procedure that guarantees the right of injured individuals, who have declined to opt out, to satisfy their claims.

Moreover, even if they fail to pursue their individual claims, section4(C)(c) provides that any remaining money will go to the state. To the extent that this money is used for general welfare purposes, as will normally be the case, the injured consumer, who fails to pursue his claim, is at least benefited indirectly.[29] Finally, the case for constitutionality is further strengthened by the strong governmental interest in affording consumers a remedy for their injuries. Not only is there a general interest in providing a mechanism for satisfying small claims, but there is a specific interest in encouraging antitrust enforcement through private treble damage actions.

A brief word might be appropriate to indicate that those situations where the Supreme Court has found notice by publication unconstitutional are distinguishable from parens patriae suits on behalf of very large groups of injured consumers. In *Mullane*, as to those beneficiaries whom the court required individual notice, they were less numerous and more easily and cheaply ascertainable. Moreover, the representation of their interests by the common fund trustee was not nearly as adequate as the adequacy of representation by state Attorneys General in parens

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[24] *See, e.g.*, In Re Ampicillan Antitrust Litigation, 55 F.R.D. 269 (D.D.C. 1972); State of West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970); State of Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969); Note, *Wrong's Without Remedy: The Concept of Parens Patriae Suit for Treble Damages under the Antitrust Laws*, 43 So. Cal. L. Rev. 570 (1970); Note, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 Colum. J Law and Social Problems 411 (1970). *See also* Manual for Complex Litigation § 1.44 (1973).

[25] As one court remarked, "Finally it is difficult to imagine a better representative of the retail consumers within the state than the state's attorney general. Historically the common law powers of the attorney general include the right and duty to take actions necessary to the maintenance of the general welfare and his presence in these actions is but a modern day application of that right and duty. In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 280-281 (S.D.N.Y. 1971).

[26] *See* R. Posner Antitrust: Cases, Economic Notes and Other Materials 178 (1974).

[27] *See* Hansberry v. Lee, 311 U.S. 32 (1940). Of course Rule 23 also requires that the interests of absent parties be adequately represented. *See* Fed. R. Civ. Proc. 23 (a)(4). But the above analysis indicates that the differences between a State Attorney General and a private party are significant insofar as adequacy of representation bears on the constitutionality of notice by publication.

[27a] *See, e.g.*, Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619 (D. Kan. 1968); C. Wright & A. Miller 7A Federal Practice and Procedure § 1786 (1972); C. Wright, Federal Courts 313 (2d Ed. 1970).

[28] 311 U.S. at 42.

[28a] See Homburger, *State Class Actions and the Federal Rule*, 71 Colum. L. Rev. 609, 646 (1971); Comment, *Class Actions under Federal Rule 23(b)(3)—The Notice Requirement*, 29 Md. L. Rev. 139, 153 (1969).

[29] *Cf.* State of West Virginia v. Chas. Pfizer. & Co., 440 F. 2d 1079, 1091 (2d Cir. 1971).

patriae suits; and as a matter of fact may have been conflicting in some cases.[30] Moreover in *Schoreder* v. *The City of New York*,[31] and in *Walker* v. *The City of Hutchinson*,[32] the names and addresses of the absent persons were either known or easily ascertainable.

For these reasons—the nature and size of the claims, the difficulty and cost of giving notice, the adequacy of representation by the state Attorneys General, the damage provisions in section 4C and the strong governmental interest in affording remedies for these antitrust violations—notice by publication would seem to be generally constitutionally permissible in parens patriae actions on behalf of injured consumers. Moreover this result seems supported by the cases and commentators cited above. In conclusion permit me to quote again from *Mullane*, "if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. The criteria is not the possibility of conceivable injury but the just and reasonable character of the requirement, having reference to the subject with which the statute deals." [33]

B. The Notice Provisions of Section 4C.

While the above discussion establishes the constitutionality of notice by publication generally in parens patriae actions on behalf of individual consumers, I would now like to turn my attention to the particular notice provisions in section 4(C)(b). The above analysis may suggest that certain amendments in these particular notice provisions are necessary to insure their constitutionality. Satisfaction of the notice obligation by compliance with a state statute governing legal publication with no further notice required raises certain problems. First, not only do the statutes vary from state to state, but many states have more than one such statute. Their vagueness and multiplicity makes it very difficult to insure that they will satisfy the above constitutional analysis. Second, they may permit the type of "back page" publication that has troubled the courts.[34] The constitutionality of notice by publication is more likely if the publication is given whatever prominence is necessary under the particular facts.[35] Moreover, many state statutes require publication in the English language only. This obviously raises constitutional problems in states that have large non-English speaking populations. Also, many state statutes have no requirements as to the content of the notice.

The constitutionality of notice by publication is much more likely if the content of the notice is such to inform those who read it of its nature and effect. Again, courts have been troubled when the content of the notice was overly formal and brief.[36] Moreover, it would seem as a matter of public policy uniformity is preferable and that the enforcement of federal rights in a federal court ought to be governed by a federally defined notice requirement.

In light of these comments, one possibility would be to amend section 4(C)(b)(1) to read as follows:

"Whenever the attorney general of a state institutes an action pursuant to paragraph (a)(1) of this section, he shall within 30 days thereafter cause publication of notice in such manner and content as the district court shall by general rule or otherwise prescribe according to the circumstances of the case."

The constitutionality of notice by publication would also be increased if the rights of the Attorney General to sue in parens patriae were limited to such suits on behalf of individual consumers. As section 4(C)(a)(1) reads now, the Attorney General of a state may bring a parens patriae suit on behalf of "persons" residing in that state. As that term is defined elsewhere in the antitrust laws, it includes persons, both real and artificial. While Assistant Attorney General Kauper has suggested limiting this right of action to suits on behalf of individual consumers,

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30 For a more thorough discussion of the distinctions between *Mullane* and actions on behalf of large numbers of consumers see C. Wright & A. Miller 7A Federal Practice and Procedure § 1786 (1972); Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 Harvard Law Review 426, 431–35 (1973); Note *Constitutional and Statutory Requirements of Notice Under Rule* 23(c)(2), 10 B.C. Indus. & Com. L. Rev. 571, 572–73 (1969).

31 371 U.S. 208, 83 S. Ct. 279 (1962).

32 352 U.S. 112, 77 S. Ct. 200 (1956).

33 339 U.S. at 314–15.

34 *See, e.g.*, Mullane v. The Central Hanover Bank & Trust Co., 339 U.S. 306, 314–15, 70 S. Ct. 652, 684 (1950). *See also* C. Wright & A. Miller 7A Federal Practice and Procedure § 1786, at pp. 153–54 (1972)

35 For a good example see the notice ordered by the trial court in the *Pfizer* case. *See* State of West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *affirmed*, 440 F. 2d 1079 (2d Cir. 1971).

36 *See, e.g.*, Schroeder v. City of New York, 371 U.S. 208, 83 Sup. Ct. 279 (1962). For a good example as to content see again the notice ordered in the *Pfizer* case *supra* note 35.

i.e., real persons, on grounds of public policy, such a limitation also has constitutional significance. Many of the reasons discussed in the above constitutional analysis regarding notice by publication generally were most accurate factually and most significant from the standpoint of public policy in cases involving large groups of individual consumers. The situation may be very different in cases involving artificial persons, i.e., corporations and unincorporated associations. For example, their claims are likely to be larger, and thus the possibility of individual suits and the desire to opt out are likely to be greater. Moreover, it is likely that they will be fewer in number and more likely to have engaged in transactions where records were kept so that the difficulty and cost of giving notice are less also. Furthermore, there is a greater chance that their interests may be different than those of individual consumers and the state Attorney General. Thus I would recommend that the act be amended to limit the right of Attorneys General to bring parens patriae suits on behalf of real persons only. To be sure there will be both cases where small businesses will as a matter of fact be difficult to distinguish from individual consumers in terms of the above considerations. Perhaps the statute can include some language to allow the court's discretion in such cases. Such an amendment would also eliminate the other problems raised by allowing such suits on behalf of corporations and other business associations.

Section 4(C)(b)(2) requires that any person who desires to opt out of the parens patriae suit give the court notice within 30 days after the publication of notice by the state attorney general. While it is difficult to ascertain the proper length for any notice period, 30 days seems rather short. It is questionable whether it meets the "reasonable time" requirement of *Mullane.* I would recommend lengthening the period to 90 days and would suggest that again this would increase the likelihood of constitutionality of notice by publication. Finally, I might suggest one further amendment. Section 4(C)(b)(2) requires that in order to opt out notice must be given by such an individual by filing a statement with the court. If an individual has already filed his own lawsuit by the time that the Attorney General files a parens patriae action, it would seem unnecessary and unfair to require him to file an additional statement with the court.[37] Moreover, this reasoning might be extended to those who filed individual lawsuits between the time the Attorney General brought the parens patriae action and the expiration of the period for filing a statement with the court. In other words, since section 4(C)(b) provides for constructive notice to injured individuals, it may be only fair also to provide for constructive opting out. In any event, this amendment would again increase the likelihood of constitutionality. In conclusion, while one can never safely predict the Supreme Court, I believe that the above amendments will safeguard section 4(C)(b) from constitutional attack.

III. STATE ATTORNEY GENERAL AS REPRESENTATIVE OF A CLASS UNDER SECTION 4(C)

Section 4(C)(a)(1) provides that, as an alternative to parens patriae suits on behalf of injured persons, the state Attorney General may, if the court finds that the "interests of justice" require, sue as a representative of a class of injured persons residing in the state. The first question that arises is as to the need for this provision. Presumably the answer is that courts have not uniformly permitted states to sue as representative parties in class actions under Rule 23.[38] Unfortunately, the relation of Rule 23 to this portion of section 4(C)(a)(1) is not clear. In all likelihood, Rule 23 would continue to apply to such actions except to the extent that other provisions of section 4C (e.g., section 4(C)(b)(1)) are inconsistent with Rule 23. Unfortunately the resulting confusion and partial incorporation of Rule 23 may jeopardize the purposes of the parens patriae authority granted in the initial portion of section (C)(a)(1). Furthermore, the rules governing suits under section 4(C)(3) are also unclear. Although no reference is made to "classes" or "representatives" in section 4(C)(3), it is likely that the procedures under Rule 23 would apply since the section does not mention parens patriae, nor does subsection (b) apply to actions brought under this section. Moreover, it is not clear why section 4(C)(3) is not redundant in light of the second alternative in section 4(C)(a)(1).

On the other hand, it is not clear that the second alternative in section 4(C)(a)(1) and section 4(C)(3) are unnecessary because of the state Attorney General's right to sue in parens patriae under the first alternative in section 4(C)(a)(1).

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[37] *Cf.* State of Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 494 (N.D. Ill. 1969).

[38] *Compare* In Re Coordinated Pre-trial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971) and In Re Ampicillan Antitrust Litigation, 55 F.R.D. 269 (D.D.C. 1972) *with* Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971).

interesting problems regarding the relationship between state and federal law are raised. If state law confers parens patriae authority on an Attorney General, no problem arises. While such capacity under state law is only a necessary and not a sufficient condition of the right to sue in parens patriae under the federal antitrust laws, sufficiency is assured by the parens patriae authority given in section 4C. But there are other possibilities. In the first place, it is possible that state law does not confer parens patriae authority. Secondly, while state law may confer parens patriae authority generally, it could prohibit the Attorney General from suing on behalf of political subdivisions or except as to claims based on the proprietary interest of the state. The issue is whether the parens patriae authority granted in section 4C overcomes these difficulties. The only question would seem to be whether Congress has the constitutional authority to grant parens patriae authority despite inconsistent provisions in state law. If they do, it would seem that the inconsistent provisions of state law would be unconstitutional under the Supremacy Clause. On the question of the power of Congress, it would seem that the demise of economic due process and the great power granted to Congress under the Commerce Clause suggest an affirmative answer. On the other hand, Congress, even if it had the power, might wish not to exercise it so as to nullify state law on the ground that such an exercise would unduly interfere with the internal administration of state government. While a case can thus be made for the retention of the second alternative in section 4(C)(a)(1) and section 4(C)(3), they should be amended so as to eliminate any confusion as to the applicability of Rule 23 to actions instituted under these provisions. Moreover, such amendments would also serve to eliminate any chance that incorporation of Rule 23 as to actions brought under the section would jeopardize the objectives of the grant of parens patriae authority in section 4(C)(a)(1).

IV. DAMAGES TO THE GENERAL ECONOMY OF THE STATE

Section 4(C)(a)(2) authorizes state Attorneys General to bring parens patriae suits to recover damages to the general economy of their state or any political subdivision. This would appear to include the damages to a state by reason of the effect an antitrust violation may have on its tax revenues, unemployment compensation programs, welfare programs and other service programs. Apparently it would also include the damage to any other economic activity because of the relationship of such activity to the industry in which the antitrust violations occur. The plaintiff's damage allegations in the *Hawaii* case illustrate with somewhat greater specificity this type of injury.[39] Section 4(C)(a)(2) is, of course, intended to deal with the denial of recovery for such damage by the Supreme Court in the *Hawaii* case.

Section 4(C)(a)(2) is perhaps the most troubling provision in the parens patriae title of S. 1284. The first question that arises is whether it is needed. One answer may be that the rationale for allowing such recovery is to further increase the deterrent effect of antitrust enforcement through damage suits. However, it is not clear that this additional deterrent effect is necessary. Congress has recently passed the "Antitrust Procedures and Penalties Act of 1974." Section 3 of that act substantially increases the fines as well as the jail sentences that a court may prescribe for criminal violations of the antitrust laws. Moreover, as noted above, private antitrust enforcement has substantially increased in recent years and there is not indication that it will abate. Finally, the parens patriae authority granted state Attorneys General under section 4(C)(a)(1) to sue on behalf of injured consumers, if passed, would further augment the deterrent effect of antitrust damage actions.

While a strong case for this section cannot be made out on the basis of the need for additional deterrent, perhaps a moderate one can be supported. I might point out on a somewhat related matter that it is not at all clear whether it would be desirable to permit recovery under section 4C for violations of section 7 of the Clayton Act or the Robinson-Patman Act.

Assuming a need for authorizing recovery for damage to the general economy of the state, several further problems arise. The first is the problem of duplicative recovery. It is possible that some of the damages to the general economy will include injuries to individual consumers for which the attorney general is authorized to sue as parens patriae under section 4(C)(a)(1). The Committee is obviously very sensitive to this problem as section 4(C)(a)(2) explicitly provides that damages recovered under that section shall not be duplicative of those recovered

[39] *See* Hawaii v. Standard Oil Company of California, 405 U.S. 251, 255–56, 92 Sup. Ct. 885, 887–88 (1972).

under paragraph (1). On the other hand, it is not clear whether the courts could effectively enforce the proviso in order to effectuate this Congressional intent. The problem with duplicative recovery could be dealt with more easily by providing that parens patriae suits by a state Attorney General under section 4(C)(a) (1) or (2) are mutually exlusive theories of recovery rather than alternative theories as section 4(C)(a) now provides.

Even if the problems of duplicative recovery can be solved, substantial problems still exist with regard to measuring damages to the general economy. There is considerable disagreement over whether such damages can be adequately measured. Some persons have argued they cannot.[40] Others, on the other hand, have argued that economists have developed models appropriate and sufficient for measuring such damages.[41] Moreover, it has been argued that recovery for such items as pain and suffering, mental anguish and maintenance of a nuisance afford a precedent for recovery of damages to the general economy.[42] On the other hand, Assistant Attorney General Kauper and Chairman Engman both indicated in their testimony to this Committee that they had grave doubts regarding the ability to measure damages to the general economy. Given the economic expertise of their two agencies, their testimony should be given great weight. One answer, of course, might be to let the courts cope with these problems as they frequently face problems of measuring damages.

However, it is necessary to distinguish between the measurement problems that arise in individual cases and those that arise in all, or at least most, cases seeking recovery for a particular kind of damage. One solution may be for this Committee to seek expert testimony from economists on this issue.[43] Moreover, even if the present state of the art in economics does not permit very adequate measurement of these damages, the state of the art may improve as courts begin to cope with the problem.[44] In any event, sound principles of judicial administration suggest that Congress ought to be cautious in placing the difficult burden of measuring damages to the general economy on the courts.[45] It should not be so unless the benefits from such actions outweigh the possible drawbacks. Given only a moderate need for the deterrent effect that section 4(C)(a)(2) would add, it is not clear that such a showing has been made with regard to damages to the general economy.

Finally, even were Congress to authorize parens patriae for damage to the general economy, it is not clear that state Attorneys General would be successful in recovering such damages in many cases. Actually, section 4(C)(a)(2) solves only one problem. In the *Hawaii* case, the Supreme Court denied relief because it found no clear Congressional intent that damages to the general economy were "business or property" within the meaning of section 4 of the Clayton Act as presently drafted. Section 4(C)(a)(2) would supply that clear Congressional intent. In any particular case, however, a state Attorney General has many hurdles to overcome before he actually would recover any money. The first hurdle is proving that a particular antitrust violation in fact caused damage to the general economy. The history of such attempts by the State of Georgia, subsequent to the Supreme Court decision in *Georgia* v. *Pennsylvania Railroad Co.*, suggests that such a showing is not so easily accomplished.[46] Moreover, once the fact of damage is proven, the amount of damage must be proven with reasonable certainty. While the certainty rule in antitrust actions has been liberalized,[47] given the problems of measurement discussed above, it is not clear that even this liberalized standard of proof can be satisfied in these cases.

A more serious problem, however, may be raised by authorizing parens patriae suits for damages to the general economy. If permitted, liability in damages for antitrust violations may be potentially unlimited or at least very great. It may

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[40] *See, e.g.*, Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 Northwestern University Law Review 193, 220 (1970).

[41] *See, e.g.*, Hawaii v. Standard Oil of California, 405 U.S. 251, 269, 92 S. Ct. 885, 894–95 (1972) (Douglas, J., dissenting).

[42] *See* Note, *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages*, 6 Colum. J. Law & Social Problems 411, 421 (1970).

[43] Unfortunately, Dr. Walter Adams, in his testimony on S. 1284, did not deal with this issue. Hopefully more economists will testify on S. 1284 and will speak to this issue.

[44] *Cf.* Williamson, *Economics as an Antitrust Defense: The Welfare Trade Offs*, 58 Amer. Econ. Rev. 18, 34 (1968).

[45] *See* Freund, Book Review, 3 J. Legal Ed. 643, 644 n. 2 (1951).

[46] *See* Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 Northwestern Univ. L. Rev. 193, 221–22 (1970).

[47] *See, e.g.*, Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 66 S. Ct. 574 (1946);

well be out of proportion to the profits from the illegal activity and may even create the risk of jeopardizing a particular firm's continued existence in the market place. Courts have always been sensitive to this problem and often have been reluctant to impose undue liability upon defendants. The traditional manifestations of this attitude are found in tort law in the doctrine of proximate cause,[48] and in contract law in the classis case of *Hadley* v. *Baxendale,* the foreseeability of contemplation rule.[49] These principles have found their way into antitrust law through the doctrine of standing expressed often in notions of causality, target area and directness or remoteness of injury.[50] In some cases denying standing the courts have even talked in language resembling proximate cause notions.[50a] Numerous antitrust plaintiffs have been denied recovery on these grounds [50b] and it is quite possible that a court, foi the reasons expressed above, might well construe section 4(C)(a)(2) strictly and often deny recovery for damages to the general economy. More importantly, because of the magnitude of the liability involved, recovery would be undesirable from the standpoint of public policy.[50c]

No clear solution emerges to the problems raised by section 4(C)(a)(2). A respectable case can be made for its deletion from S. 1284. On the other hand, Congress may wish to amend this section providing recovery only for lost tax revenues and increased burdens on governmental programs. In any particular case, of course, these damages would have to be proven with requisite certainty. Finally, Congress, with full sensitivity to the problems raised by allowing recovery for damages to the general economy, may prefer to leave the whole problem to the court on the theory that Congress has merely authorized the protection of this interest under the antitrust laws; and the courts, given the genius of the common law system, can confidently be relied upon to apply section 4(C)(a)(2) wisely and equitably in particular cases.

IV. RECOVERY OF AGGREGATE DAMAGES

Section 4(C)(c)(1) authorizes the recovery of aggregate damages in actions brought under subsection (a) of section 4C. This is a major innovation in antitrust law since it obviates the necessity of separately proving individual claims. It is an important and needed change and I strongly endorse its passage.

One of the major problems encountered by consumers attempting to bring class actions under Rule 23 involved damages. The effect of the large class size on the computation and distribution of damages troubled many courts and led to refusals to certify the action under Rule 23 because of unmanageability.[51] Innovative attorneys and commentators saw recovery of aggregate damages, commonly known as fluid class recovery, as an answer to this problem. But the Second Circuit in *Eisen III* found that such a procedure was not authorized under Rule 23 and the future of fluid class recovery looked dim. Moreover, some courts were not very sympathetic to proof of damages through economic evidence.[52] Others were troubled by the windfalls that might occur by paying damages to parties who may not have been injured. On the other hand, individual claims were often very difficult to prove as the antitrust violations involved small everyday transactions for which records were not normally kept and, of course, were very numerous as well. For practical purposes, consumers were without a remedy and their injuries would not be compensated.[53] This problem, of course, is a major aspect of the dilemma faced by consumers that is discussed in the initial portion of this testimony. Section 4(C)(c) solves the major problems regarding damages raised by large consumer class actions under Rule 23 and

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[48] *See generally* W. Prosser, Torts 236–91 (4th ed. 1971).
[49] *See generally* D. Dobbs, Remedies 157–58, 303–17 (1973).
[50] *See* P. Areeda, Antitrust Analysis ¶ 160 (1974); Comment, *Mangano and Ultimate-Consumer Standing: The Misuse of the Hanover Doctrine*, 72 Colum. L. Rev. 394, 396–403 (1972); Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 Nw.U.L. Rev. 691 (1963).
[50a] *See, e.g.*, Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564 (7th Cir. 1963).
[50b] *See, e.g.*, cases cited in Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 262 n.14, 92 S. Ct. 885, 891–92 n.14 (1972).
[50c] In fact one commentator has suggested that a foreseeability requirement may be necessary if standing in antitrust cases is liberalized. See Comment, 72 Colum. L. Rev., *supra* note 50, at 414.
[51] *See, e.g.*, Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973); City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971).
[52] *See, e.g.*, Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427 (W.D. Mo. 1973).
[53] *See* C. Wright & A. Miller, 7A Federal Practice and Procedure § 1781, at pp. 122–23 (1972).

provides an effective way for compensating consumers injured by antitrust violations. It accomplishes this objective by a two stage proceeding. In the first stage, set out in section 4(C)(c)(1), the total amount of injury caused to consumers in the state by the antitrust violation is computed on the basis of scientific evidence. The second stage, set out in section 4(C)(c)(2), is a procedure in which individual claims by injured persons may be made against the fund created in the first stage with any remaining money going to the state in which the violation occurs.

More important, in addition to accomplishing these objectives, recovery of aggregate damages is crucial to effectuating the deterrent effect of private antitrust litigation.[54] As Professor Posner has pointed out:

"The important thing, in short, is that the defendant be made to pay damages, appropriately measured; how those damages are distributed will not affect the subsequent behavior of the defendant and others similarly situated.

"From the economic standpoint, therefore, we want to minimize the costs (of notice, disbursement of proceeds, etc.) of effecting compensation. One way of doing this would be to award the entire amount of damages to the lawyers for the class. Another would be to endorse the *parens patriae* concept rejected by the Supreme Court in the *Hawaii* case in favor of the class action. The former approach would have the advantage of creating enormous incentives for the vigorous and effective private enforcement of the law. Of course, we may not want to see the antitrust laws enforced *that* vigorously. The fluid-recovery concept as described in the *Pfizer* opinion represents an intermediate approach." [54]

Moreover, given the difficulty of proving individual claims, the parens patriae authority granted under section 4(C)(a) might be almost meaningless without subsection (c)'s authority for recovery of aggregate damages.[55] Although recovery of aggregate damages has been derisively denominated a "pot of gold" concept by some who defend against these suits,[56] such arguments give insufficient weight to the importance of deterrence and the Congressional purposes of private damage relief under the antitrust laws.[57] Thus, it is clear that the authority granted in section 4(C)(c) of S. 1284 is an important and needed change in the antitrust laws.

Despite this need, it has been argued that granting such authority will entail administrative and constitutional problems. One administrative problem raised is the difficulty of computing aggregate damages. While some have argued that in many cases computation will be difficult or impossible,[58] others, including experts such as Assistant Attorney General Kauper and Professor Posner, have felt that the problems of computation are not that severe in most cases.[59] Moreover, those with experience in computing damages for aggregate recovery apparently feel that the problems can be overcome.[60] This does not mean, however, that there will never be problems in computing aggregate damages. But, again one must distinguish situations where problems of computation occur in individual cases from those that are likely to occur in most cases of a particular type and are very substantial. It is only in the latter situation that there is an argument for withholding that class of cases from the courts altogether, as may be the case

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[54] *See, e.g.*, C. Wright & A. Miller, 7A Federal Practice and Procedure § 1784, at P. 123 (1972); Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 Mich. L. Rev. 338, 371 (1971).

[54a] *See* R. Posner, Antitrust Law: Cases, Economic Notes and Other Materials 177 (1971). *See* Note, *The Cost-Internalization Case for Class Actions*, 21 Stanford L. Rev. 383 (1969).

[55] As Judge Real said in the District Court in the *Frito-Lay* case, "But what corporation would not risk violation of the antitrust laws where maximum penalties are miniscule compared to the potential harm to a public unable to meet the 'technical' requirements of proof of damage? Or, even more to the point—what corporation would risk violation of the antitrust laws if they were assured every penny of conspiratorial gains, three times over, where the ultimate result of a proven price-fixing conspiracy? Putting the question is its own obvious answer."

State of California v. Frito-Lay, Inc., 333 F. Supp. 977, 981 (1971), *reversed*, 471 F. 2d 771 (9th Cir.) *cert denied*, 412 U.S. 908, 93 S. Ct. 2291 (1973).

[56] *See, e.g.*, Malina, *The Search for the Pot of Gold, Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 41 Antitrust L.J. 301 (1972).

[57] As pointed out in the Antibiotic Antitrust Actions: "the most misleading of their [defendants] argument characterizes a class-wide recovery as a 'pot of gold' which the plaintiffs and their counsel are somehow not entitled to receive. If we assume that a price-fixing conspiracy is proven at trial, however, the defendants will certainly have no right to the 'pot of gold' created by their illegal activities. And the success of their scheme and the size of the 'pot' would certainly be no basis for leaving the money in their hands."

In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 287 (1971).

[58] *See, e.g.*, Malina, footnote 56 *supra*, at pp. 313–15.

[59] *See* R. Posner Antitrust: Cases, Economic Notes and Other Materials 159 (1974). Assistant Attorney General Kauper stated his views in his testimony during the hearings on H.R.12528, the parens patriae bill, in the House of Representatives in March, 1971. *See* p. 29 of those Hearings. Furthermore, it is interesting to note that in his testimony earlier before this committee on S.1281 Chairman Engman had doubts as to the measurement of excess profits only and in particular the problem of allocating them when a violation may have affected several states.

[60] *See, e.g.*, Freeman, *Class Actions from the Plaintiff's Viewpoint*, 38 J. Air Law and Commerce 101 (1972).

regarding damages to the general economy. Computation of aggregate damages, however, falls within the former case and is distinguishable from the situation involving damages to the general economy. Thus, while there may be difficulties in particular cases, courts are well equipped and experienced to handle the problems of computation involved in measuring aggregate damages.[60a]

The other administrative problem involves supervising the distribution of damages and the claim procedure. While the procedure for distributing recovery under section 4(C)(c)(2) will require a certain amount of supervision,[61] the burden is not sufficiently great nor unmanageable to justify deletion of section 4(C)(c) from S. 1284. First, a certain amount of administrative burden can legitimately be placed on the court. And, of course, courts are accustomed to handling a certain amount of burden in antitrust cases during the pretrial and litigation stages. Second, part of the burden for administering the distribution of recovery can be placed on the state's Attorney General [62] and it is fully consistent with their role as parens patriae. Moreover, the experience in the antibiotic antitrust cases indicates that the problems of supervising distribution of the fund are manageable. Thus, possible administrative difficulties do not support opposition to the recovery of aggregate damages and to the enactment of section 4(C)(c).

Opponents of parens patriae authority have also argued that section 4(C)(c) would involve an unconstitutional denial of the right to jury trial and due process. As to the right to a jury trial, the theory is apparently that the elimination of the requirement of separate proof of individual claims is a denial to the right to a jury trial on the question of damages.[63] To the extent that this argument has been raised regarding fluid class recovery in class actions under Rule 23, it has been rejected by the courts[64] and the commentators.[65] Interestingly, an article very critical of fluid class recovery by a leading opponent of both parens patriae actions and fluid class recovery made no reference to the denial of a constitutional right to jury trial.[66] While section 4(C)(c) may reduce the right to jury trial in the interests of furthering the substantive purposes of the antitrust laws, not all restrictions of the right to a jury trial are unconstitutional.[67]

The arguments of denial of due process are apparently premised on the notion that the elimination of separate proof of individual claims denies defendants the right to confront and cross-examine those alleging to be injured and to defend against sham or exaggerated claims.[68] Again, in the context of class actions under Rule 23, the courts that have carefully analyzed this argument have rejected it [69] as have the commentators.[70]

[60a] In rejecting defendants' argument in the *Antibiotic* case that aggregate damages were not measurable Judge Lord stated "Most important management decisions in the business would in which these defendants operate are made through the intelligent application of statistical and computer techniques and these class members should be entitled to use the same techniques in proving the elements of their cause of action. The court is confident that they can be successfully utilized in the courtroom and that their application will allow the consumers to protect their rights while freeing the court and the defendants of the specter of unmanageability. In these circumstances the court cannot conclude that the defendants are constitutionally entitled to compel a parade of individual plaintiffs to establish damages."

In Re Antibiotic Antitrust Actions, 33 F. Supp. 278, 289 (S.D.N.Y. 1971).

[61] *See generally* Comment, *Damage Distribution in Class Action, the Cy Pres Remedy*, 39 U. Chi. L. Rev. 448 (1972).

[62] *See* Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 Mich. L. Rev. 338, 370 (1971).

[63] *Cf.* Pollock, *Class Actions Reconsidered: Theory and Practice Under Amended Rule 23*, 28 Bus. Lawyer 741 (1973); Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The 23rd Annual Antitrust Review*, 71 Colum. L. Rev. 1, 4-17 (1 1).

[64] *See* In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 287-89 (S.D.N.Y. 1971). *Cf.* Union Carbide and Carbon Corp. v. Nisley, 300 F. 2d 561 (10th Cir. 1962).

[65] *See* C. Wright & A. Miller, 7A Federal Practice and Procedure § 1801 (1972); Miller, *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(B)(3)*, 54 F.R.D. 501 (1971).

[66] See Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 47 N.Y.U. L. Rev. 477 (1972).

[67] *See* Colgrove v. Battin, 413 U.S. 149, 93 S. Ct. 2448 (1973). In *Colgrove* the Supreme Court stated: "The Amendment, therefore, does not 'bind the Federal Courts to the exact procedural incidents or details of jury trial according to the common law in 1791.' and 'new devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. . . .'" *Id.* at 157, 2452–53.

[68] *See, e.g.*, Pollock, *Class Actions Reconsidered: Theory and Practice under Amended Rule 23*, 28 Bus. Lawyer 741 (1973); Handler, *24th Annual Antitrust Review*, 72 Colum. L. Rev. 1 (1972).

[69] *See* In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 287–89 (S.D.N.Y. 1971). Of course, there is language in the Second Circuit's opinion in *Eisen III* that fluid class recovery involves a denial of due process. *See* 479 F. 2d 105, 1017 18 (2d Cir. 1973). This aspect of the Second Circuit's decision in *Eisen III* has been characterized as unnecessary, unfortunate and wrong. *See* Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 Harv. L. Rev. 426, 453 (1973). In addition, subsequent language in the opinion implying that Congress has the power to fashion a remedy for consumers is either inconsistent with the dicta concerning due process or makes it inapplicable outside the context of Rule 23. *See* 479 F. 2d at 1019. Moreover, the Supreme Court in its opinion in *Eisen* did not rule on this issue and vacated the opinion of the Second Circuit. The only other case supporting the due process objection apparently is Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43 (D. Del. 1974), which is merely conclusory, with no analysis of the issue and relies simply upon *Eisen III*.

[70] *See* Note, 87 Harv. L. Rev. *supra* note 69, at 453.

More importantly, these arguments of unconstitutionality are even weaker in the context of parens patriae actions under section 4C than they are in the Rule 23 class action context. The claim that section 4(C)(c) involves a denial of due process and right to jury trial fails to appreciate the substantive effect of Title IV of S. 1284. Section 4C changes substantive antitrust law. It substitutes the claim of the state as parens patriae in place of individual claims, except of course for those who opt out under subsection (b)(2). Not only does section 4C authorize the states to sue as parens patriae, but it is no longer a matter of individual liability. Antitrust violators are now liable to the state who acts in place of its citizens. The state has no right, of course, to keep all the money for itself and in this sense it receives the money as trustee for its citizens. All of the arguments of unconstitutionality are premised on the notion that the defendants' liability is to individuals. Under section 4C this is no longer the case. While these arguments may have some merit as to the proper interpretation of existing section 4 of the Clayton Act, they do not support any constitutional objection to section 4(C)(c). In proceedings under section 4C defendants will get their day in court and a jury trial, if they so choose, on the pertinent issues: whether the antitrust laws have been violated; whether such violations have caused injury to the plaintiff, the question of the nexus between violation and injury; and the amount of damage owed to the plaintiff, the state Attorney General as parens patriae. Subject to the discretion of the court, the defendants are free to engage in whatever pretrial discovery they chose, to raise whatever affirmative defenses they wish and to call whatever witnesses they want.

In conclusion, the recovery of aggregate damages and the elimination of separate proof of individual claims is a desirable and needed change in the antitrust laws. Its deletion from Title IV of S. 1284 cannot be supported on administrative nor constitutional grounds. Given the broad power that Congress has under the Commerce Clause and the demise of substantive due process, there seems to be little doubt that Congress has the constitutional power to enact section 4(C)(c).[71] In fact, even the most ardent opponents of parens patriae authority and fluid class recovery seem to admit that Congress has this power.[72] Moreover, there is precedent for Congressional action in the accounting remedies provided under the Trademark and Patent Laws.[73] Finally, recovery of aggregate damages is supported by the commentators [74] and courts [75] as a wise, desirable and appropriate solution to the problems discussed in the initial portions of this testimony.

VI. CONCLUSION

As described above, consumers injured by antitrust violations found no effective remedy under the existing law and procedure. While many courts denied relief they were sensitive to the problem and sympathetic to the need for a remedy. Consequently, many of them invited Congress to act.[76] The introduction of S. 1284, Title IV initiates the process of responding to that invitation. Passage of the bill would complete that response.

More importantly, S. 1284, Title IV is an appropriate response and effective solution to the problem of affording relief in cases where numerous consumers have been injured by antitrust violations. Moreover, it meets the problems raised by the courts and certain segments of the bar to providing remedies within the existing confines of Rule 23 and section 4 of the Clayton Act. In the first place, the dimensions of the cases will be reduced since actions proceeding under section 4(C)(a) will be limited to persons within one particular state. Many of the cases

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[71] *See* Note, *Managing the Large Class Action: Eisen* v. *Carlisle & Jacquelin*, 87 Harv. L. Rev. 426, 453 (1973).

[72] *See* Handler, *24th Annual Antitrust Review*, 72 Colum. L. Rev. 1, 41 (1972); Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 47 N.Y.U. L. Rev. 477, 493 (1972).

[73] *See* 15 U.S.C. § 1117 (1970); 35 U.S.C. § 284 (1970).

[74] *See, e.g.*, C. Wright & A. Miller, 7A Federal Practice and Procedure § 1784 (1972); Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 Univ. Chi. L. Rev. 448 (1972); Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 Mich. L. Rev. 338 (1971). *Cf.* Kaplan, *A Prefatory Note*, 10 B.C. Indus. & Com. L. Rev. 497 (1969).

[75] *See State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F. 2d 1079 (2d Cir. 1971). *affirming* 314 F. Supp. 710 (S.D.N.Y. 1970). For judicial utilization of similar procedures in other contexts see cases discussed in Note, 70 Mich. L. Rev. *supra* note 74, at pp. 365–70.

[76] *See, e.g.*, In re Hotel Telephone Charges, 500 F. 2d 86 (9th Cir. 1974); *California* v. *Frito-Lay, Inc.*, 474 F. 2d 774 (9th Cir.), *cert denied*, 412 U.S. 908 (1973); *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973); *City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971). Even the Second Circuit in its opinion in *Eisen III* showed some sympathy suggesting that Congress could fashion relief to satisfy the claims of injured consumers. *See* 479 F. 2d 1005, 1019 (2d Cir. 1973).

that troubled the courts involved consumers in a multistate or even nationwide area. Actions under section 4(C)(a) will involve more than one state only when they are consolidated, in the exercise of sound judicial discretion, pursuant to the procedures of the Multidistrict Litigation Act. Secondly, section 4C provides a solution to the problems of notice and computation and distribution of damages in antitrust consumer class actions. While it departs from the procedures traditional to cases involving one plaintiff and one defendant or at most a very small number, it is not without safeguards and is appropriate within the context of the problem presented.[77] Finally, it eliminates the problems raised regarding the activities and fees of attorneys representing the consumer classes. Section 4C also meets many of the objections raised by the Department of Justice and state Attorneys General in their prior testimony in the House of Representatives on another version of a parens patriae bill, H.R. 12528. And it meets the objections of the Supreme Court to extending the common law notion of parens patriae to these cases.

In general, authorizing state Attorneys General to sue in parens patriae is supported by many commentators as an appropriate and effective solution to the problems presented in the initial portion of this testimony.[78] And, as discussed above, there are no constitutional objections that ought to deter passage of section 4C. Moreover, enactment of section 4C would be completely consistent with the other incentives in the Clayton Act for private antitrust enforcement and would further implement the Congressional policy of deterring antitrust violations through such suits. What Judge Weinstein once said regarding class actions is also appropriate in support of the case for parens patriae authority. His remarks effectively raise the fundamental issue involved.

"The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens—including those deprived of human rights, consumers who overpay for products because of antitrust violations and investors who are victimized by insider trading or misleading information—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefited, to the extent of many millions of dollars, from collusive, illegal pricing of its goods to the public.

"When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy—or at least deter—that conduct.[79]

Congress now has the opportunity to afford that procedure by enacting S. 1284, Title IV and since, as Judge Weinstein points out, the problem is basically a political one, Congress is perhaps the most appropriate body for providing a solution. Thus, I strongly support the basic principle and rationale underlying Title IV of S. 1284 and urge its enactment with the amendments suggested throughout my testimony.

Senator HART. To Professor Brodley, let me make an apology. I will have to take another very brief recess, there is a live quorum call.

[Recess.]

Senator HART. We will be in order. I am not sure that I indicated before that brief recess that our next witness is Dr. Joseph F. Brodley, professor of law, Indiana University.

Professor, we welcome you. And I am sorry that even today, after the disaster of last week, we are still very late.

[Professor Brodley's prepared statement appears on p. 505.]

Professor BRODLEY. Thank you, Senator.

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[77] *See* C. Wright & A. Miller, 7A Federal Practice and Procedure §§ 1784, 1786 (1972).

[78] *See* R. Posner Antitrust: Cases, Economic Notes and Other Materials 159 (1974); Comment, *Damage Distribution in Class Actions: The Cy Press Remedy*, 39 U. Chi. L. Rev. 448 (1972); Note, *Wrongs Without Remedy: The Concept of Parens Patriae Suit for Treble Damages Under the Antitrust Laws*, 43 So. Cal. L. Rev. 570 (1970); Note, *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages*, 6 Colum. J. of Laws & Social Problems 411 (1970).

[79] As quoted in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 186 n. 8, 94 S. Ct. 2410, 2156 n. 8 (1974) (Douglas, J., dissenting in part).

STATEMENT OF JOSEPH F. BRODLEY, PROFESSOR OF LAW, INDIANA UNIVERSITY, BLOOMINGTON, IND.

Professor BRODLEY. Senator, the hour is late, and verbal lightning seldom strikes in the late afternoon. But, I was struck by your dialog last week with Mayor Alioto.

You spoke, as you recall, of the need for evenhanded justice in the antitrust field. And, I think, unforgettably I well remember the analogy you made to the poor youth caught in a back alley, accused—convicted of a crime, and the corporate official—you called him "the pillar of the community" who admits to violating the antitrust laws.

Now, that was said with respect to nolo contendere pleas. I appear today principally on the issue of premerger notification. And yet, that analogy, I think, is apt, although perhaps less obviously. Let me explain what I mean.

Years ago, I was a young lawyer, just beginning the practice of antitrust law. And I attended my first meeting of the antitrust section in Washington. The subject was mergers. And a distinguished practitioner and expert in the antitrust laws was holding forth. The question was raised: "Well, counsel, is not the way to handle a merger, to go in to the Department of Justice in advance and ask if this merger violates the antitrust laws?"

And in my innocence, I thought, "Well, that sounds like a perfectly plausible way to get about it."

Can you imagine my surprise when this distinguished counsel said, with a knowing tone, that only the naive or the uninformed would follow such a course? It was not clear to me, immediately, what he meant. It became clear as I learned more about the operation of the law, for, if instead of seeking advance clearance with the risk that the Government will proceed against you as a matter of course if you merge in the face of Government disapproval—if instead of seeking clearance the company attempts, as far as it can, to secretly prepare its merger plans, and then to merge with utmost speed—if it follows that course, its chances of gain are great. Let me explain:

First, the Government may not discover about the merger at all until after consummation. Now, that is a little less true today under the FTC reporting requirements, but it is still true as to any merger below the large size covered by the FTC reporting program.

But second, the Government may discover it, but too late to prepare an effective case, and that is true today. And, therefore, the merger will be consummated.

And third, the Government may discover in time, and may be able to prepare its case, but will be unable to get an effective preliminary injunction.

In each case, the merger is consummated. And now, I add the knowledge that has been gained since that time, the knowledge revealed by recent studies that whenever a merger is consummated, the chances are overwhelming that the effects of that merger will not be undone. Indeed, the best study of the subject shows that in 90 percent of the cases, the merger relief must be rated as unsuccessful or deficient if the merger was consummated prior to the Government action.

Now, this situation has long troubled those of the antitrust community. Attorney General Herbert Brownell made one of his rare appearances before a congressional committee to urge adoption of the premerger notification bill, and he stressed the point that it was a matter of evenhanded justice, not just of efficiency of enforcement.

And Attorney General Kauper, to some extent, struck the same note, when he talked about the "midnight merger," consummated in defiance of expected Government suit and for the purpose of thwarting relief.

And therefore, the need for this bill is clear and long-recognized, both on fairness grounds, as well as efficiency.

Now, I want, in my oral remarks, to explore three or four of the main questions that have been raised—not exactly in opposition, but in questioning whether the bill is desirable—whether this bill appropriately meets the need?

The first question is: Will not this bill clog desirable market transactions—the nonoffending merger, the shareholder tender offer which stimulates laggard management? Will it not clog the free market system?

Well, I am prepared to say that perhaps, as now written, there is some danger, but I think the bill can be effectively amended to remove that danger. And I have in mind principally three things:

First, I think that the long delay period that the bill now permits can be tightened. I think, in fact, it can be tightened by adhering a little more closely to the language contained in the prior bills that have been introduced on this subject.

Now, I will not go into detail, but the idea is, that you have a time certain for notification—and, that is provided here—then a time certain for the Government to say, "We want more data"—and thereafter a time certain for the defendants to respond—and finally an outside period by which the Government must act. I would compress the whole thing into 80 days. And I think even the shareholder tender would be manageable within that period.

Second, I would cut back somewhat on the total Government discretion to ban mergers by instituting suit. I would cut back on that to the extent that I would limit the automatic stay to horizontal mergers, which are the most immediately undesirable type of mergers, and which constitute most of the suits that the Government is now bringing. As to vertical and conglomerate mergers, I have suggested a somewhat different kind of relief.

And third, with respect to the provisions of sec. 23(g), which are designed to take the profits out of mergers, I would not go as far as those provisions now go. I would not provide for escrow of profits, nor the disgorging of any gain from the merger. However, I would provide for mandatory divestiture. And I would add to that mandatory divestiture provision—this would go beyond your bill—that the divestiture be by spinoff or by public offering of the stock.

Thus, I would have the bill take some of the profits out of mergers, but not all, because I think to go all the way would be unnecessary since there will be a stay against the most harmful kinds of mergers anyhow, so those mergers will not be consummated.

And for reasons that I have explored in my prepared statement, I think it might even be counterproductive to go further.

The second question that has been raised—and Mr. Lerman, among others, raised this question—is why is not the existing FTC premerger notification program adequate? After all, corporations now have to notify the FTC 60 days in advance.

Well, first, the FTC itself says that it has not, under that program, been able to get the information it needs—that is Mr. Engman's testimony—to be able to act prior to the merger.

Second, the merging parties can compress or shorten this 60-day notice period at will. Let me explain how.

The FTC concedes it has no authority to impose a waiting period. That is to say, if the parties to a merger notify the FTC, following an agreement to merge, that "We are going to merge in 20 days, because we have agreed to merge in 20 days," the FTC would find that this complies with their requirement, for the FTC has no power to delay the merger. So by staging their timetables, the parties can compress and shorten the notice period to a point where, of course, it would be too little to allow effective Government action.

Third, the existing law and FTC notification program provides for no stay of the merger, so regardless of notice, the merger, in most cases, will be consummated with all the problems that involves.

And fourth, as I suggest in my prepared statement, the notification program of the FTC applies only to the largest mergers; it would not include a great many which the Government has challenged. Indeed, the best data I could obtain, covering an earlier period, 1950–61, shows the FTC notification program would have caught only 38 percent of the mergers the FTC actually challenged. It would catch more today, but a lot would be left out.

The final question I want to address myself to is—it was stressed by Mr. Lerman in his excellent memorandum—why is not the Government's existing right to obtain preliminary relief from a district court sufficient without an automatic stay provision?

After all, if the Government has a good case, why cannot it go into the district court, convince the judge, and get a preliminary injunction? Why must the Government be given an automatic stay?

In the connection Mr. Lerman makes the point that the Government has gotten preliminary relief in most of the cases where it has asked for it. And that is correct. Frequently the Justice Department does get "some" kind of preliminary relief, but the only effective preliminary relief is a preliminary injunction. The other kinds of relief, the protective orders of various sorts, permit the consummation of the merger. And the economic studies then show that such consummation will not be effectively undone, so as to restore a viable firm. Therefore, unless the Government gets a preliminary injunction banning the merger a failure of relief occurs most of the time.

Now, let us shift the spotlight from just any kind of preliminary relief, which I think Mr. Lerman was talking about, to this particular kind of relief—effective preliminary injunction and here I have cited a study showing that in the period 1955–71, which is the big merger activity period, there were 167 merger suits and only 15 preliminary injunctions.

Why has the Government not been able to get more preliminary injunctions? It does not always move for them, of course. But the chief reason seems to be that the Government has been put to the

same standard of proof on the motion for preliminary injunction, which it must face at the ultimate trial: It must show that the merger probably restrains competition. Well, it is unprepared on an early record to make the kind of showing that one would make at the end of a long trial. The case is simply not ripe. Further, there is virtually no chance of getting appellate review of the district court's decision.

So the preliminary injunction is not something which has been readily available. And therefore, the provision of the bill, which would provide for that, is needed. And, as I have said, I would narrow the mandatory stay to horizontal mergers.

To be sure, the bill does need some revision, as I have suggested. And there are a few more suggestions in my prepared statement.

But, Senator Hart, this is the 19th bill which has been introduced on this subject in the Congress. And this is the 19th year since that first bill was introduced. And what I want to suggest to the committee is that there has been adequate deliberation and that the time is now ripe for legislative action.

Senator HART. That was an interesting summary to an excellent paper. But that very last point, perhaps the least of important of all, is the one, I'm sure, that will stick in my mind.

Mr. Nash?

Mr. NASH. In your prepared statement you discuss the transactions which you believe to be covered by title 5, and those which you believe should not be covered.

Professor BRODLEY. Yes.

Mr. NASH. Obviously the intention is not to encompass the ordinary day-to-day business transaction.

The issue to be decided is whether a laundry list of exemptions goes into the statute or whether the exemptions are left to the rulemaking power of the FTC—as the bill is now drafted.

Professor BRODLEY. Yes.

Mr. NASH. In your statement I believe you suggested you prefer the way the bill is presently drafted. Assistant Attorney General Kauper suggested some exemptions should go into the bill.

Can you elaborate on the pros and cons of each approach?

Professor BRODLEY. Yes. If there was any subject that I might have included beyond what I did speak of that would be perhaps the next topic.

My study of the prior history of these bills shows that the attempt to set forth the enumerated exemptions was a pitfall. One version of the bill in prior years came up with 15 exemptions and still those that were opposing the bill were not satisfied.

It is extremely difficult to set down in legislative concrete all of the kinds of transactions that ought not to be subject to reporting. It seems to me that the matter is just ready made for the flexibility of an administrative process. The important thing for the bill to do is to make the standard clear under which the exemptions or the legislative reporting is to occur.

I think the bill does this simply in its context. The standard for reporting should simply be mergers, and the other kinds of transactions which are of the type apt to violate the act.

The only thing I would say further is, that the same problem arose under the Williams Act—dealing with shareholder tender offers—and

this was the tactic adopted under the Williams act, that is, setting forth the exempting power in an administrative agency—the SEC—with only the legislative purpose made clear.

There is another point I would add, which is, if you set forth some exemptions, then immediately the argument is open that the legislature did not intend to permit others, because if it thought the others were important, why would not it have listed those, too?

I think the bill is just right as it is now written.

Mr. NASH. Thank you. With respect to the automatic stay provisions of the bill, you suggest a substitution of the Bank Merger Act standard.

Assistant Attorney General Kauper suggested we adopt language such as irreparable injury as a ground for lifting the stay.

Can you tell us how the courts have construed the Bank Merger Act's discretionary provision and indicate the number of times in which the stay has been lifted?

Professor BRODLEY. I do not know how many times the stay has been lifted. I did not investigate that. The interpretation has been that the stay will be granted unless the action is found to be substantially without merit.

I do not think that is very different than what Attorney General Kauper has proposed. It seems to me more symmetrical and clear, however, to follow the wording of an existing statute which is in the merger field.

Mr. NASH. Who has the burden of proof to lift the stay in the Bank Merger Act?

Professor BRODLEY. The defendant, I think, would have to come in and show that there are reasons why the action is without merit. I would assume that if the defendant stands quiet and you have a colorable complaint, that the stay will issue. So the burden does fall on the defendant.

Mr. NASH. Thank you.

I have no further questions, Mr. Chairman.

Senator HART. Mr. Chumbris?

Mr. CHUMBRIS. Thank you, Mr. Chairman. I do not have any questions to ask of the witness, but Mr. Nash has brought up the question of the Bank Merger Act.

And I understand that we have received, for the record, a statement from the Association of Bank Holding Companies.[1]

Mr. NASH. They were submitted to the printing clerk for inclusion in the record.

Mr. CHUMBRIS. Yes. I merely raise it just because Senator Hruska has received some mail from Nebraska, and Senator Thurmond's office has called me about several letters that they have received.

They are concerned about title V, and if I may read just briefly what their concern is, "It appears to me that this would require"—meaning the requirement in the bill—"bank holding companies to file notification of any acquisition even though all such acquisitions now are subject to prior approval by the Federal Reserve Board under the Bank Holding Company Act of 1956.

[1] See p. 1017.

"The Fed does a very adequate job of reviewing all applications for the acquisition of stock or assets by bank holding companies and must also notify the Antitrust Division of the Department of Justice"—and I understand the same thing applies to the FTC—"of these applications before they are approved."

And with that in mind, I understand that perhaps we may receive statements from people who will touch more elaborately on this point, and if we do receive them, Mr. Chairman, may we have them included in the record of the hearings?

Senator HART. They will be received and made a part of the record. And Mr. Chumbris' comment reminded me of the letter received from the President of the National Bank of Detroit expressing a similar concern.

And I am not carrying my reply around in my pocket, but if I was, I'd put it in the record. But in response to that letter I acknowledge the desirability of including certain exemptions in the bill.

Mr. CHUMBRIS. Also I received yesterday afternoon a statement by by the American Life Insurance Association submitted to the Subcommittee of Antitrust on this bill and in which they raise a similar problem there, and at the end of it they have an attachment with some excerpts from H.R. 2511 of the 90th Congress, 1st session, 1967, which indicates certain exemptions which probably should be considered by the subcommittee when it takes up this bill.

Senator HART. Yes.

Mr. CHUMBRIS. Thank you very much, Mr. Chairman. And thank you very much, Mr. Brodley.

Senator HART. Professor, again, thank you.

Mr. BRODLEY. Thank you, Senator Hart.

[The prepared statement of Mr. Brodley follows:]

PREPARED STATEMENT OF JOSEPH F. BRODLEY, PROFESSOR OF LAW, INDIANA UNIVERSITY, BLOOMINGTON, IND.

PREMERGER NOTIFICATION

I would urge the adoption of the premerger notification provisions of S. 1284 with certain modifications and amendments. There has been a long felt Congressional and Presidential interest in premerger notification legislation, as reflected in more than a dozen previous bills in four separate Congresses, and passage by the House of Representatives in the 84th Congress by overwhelming vote. In five successive messages to Congress, President Eisenhower urged adoption of the legislation. While S. 1284 differs in important respects from the previous bills, it seems responsive to the same basic concerns.

I. Need for Premerger Notification

The Celler-Kefauver Act of 1950 must surely rank as the most notable and successful piece of antitrust legislation since the passage of the Clayton Act in 1914. In terms of antitrust effectiveness Chiago economist George Stigler finds the merger law rivaled only by the anti-collusion provisions of the Sherman Act.[1]

But successful as that Act has been in reforming the substantive law of mergers and in deterring the most anticompetitive types of mergers, the Act has been little short of a failure in its remedial provisions. Careful studies,[2] which have been published only in the last few years, reveal that the remedial provisions of merger decrees have almost invariably failed to restore the competitive conditions existing before the merger. Typically, the result of the final decree is the divestiture of a stripped down shell; or of truncated assets that never were and never could be a

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[1] G. Stigler, The Economic Effects of the Antitrust Laws, in the Organization of Industry 270-71 (1968).
[2] K. Elzinga, *The Anti-Merger Law: Pyrrhic Victories*, 12 J. Law & Econ. 43 (1969); Pfunder, Plaine & Whittemore, *Compliance with Divestiture Orders Under Section 7 of the Clayton Act: An Analysis of the Relief Obtained*, 17 Antitrust Bull. 19 (1972).

viable firm; or the sale to a buyer which had it as an original matter sought to acquire the divested firm would itself have violated Section 7; or, indeed, in a surprising number of cases, no divestiture at all. And any relief given has been tardy and long-delayed. Thus, Professor Elzinga in his study of 39 merger cases in which relief was given, concluded that the decree could be viewed as truly successful in only three instances. Using as his criterion of success, the timely restoration of a viable firm, he found the government to have obtained unsuccessful or deficient relief in 90% of the cases. What relief was adjudged came on the average five to six years after the unlawful merger.[3]

It is startling to contrast the language of the Supreme Court in some of its leading merger cases with the decree finally entered. In *United States* v. *Continental Can Company*, 378 U.S. 466 (1964) the Court strikes down a merger between a leading producer of metal containers and a leading producer of glass containers, in part because the latter had been removed "as an independent factor in the glass industry" (p. 463) and in order to preserve its "dynamic long-run potential." (p. 466) Eight years later the final decree permitted the sale of most of the assets of the glass container producer to the third largest glass container producer in the United States.

In *United States* v. *Von's Grocery Company*, 384 U.S. 279 (1966) the Supreme Court held unlawful the acquisition of the sixth largest grocery chain in Los Angeles by the third largest chain, characterizing the merger as that of "two already powerful companies merging in a way which makes them even more powerful than they were before." (p. 278) Far from restoring the acquired firm, the final decree simply permitted Von's to sell any 35 of its 108 stores, thereby permitting it to choose its least profitable outlets, scarcely a diminution of its power.

Lower court decisions are more shocking. They reflect instances where one acquiring firm refused to offer the acquired company for sale except at an unrealistically high price, and when predictably no buyer was forthcoming, one year later was relieved of its obligation to divest;[4] and another where the acquiring firm, having sold off most of the assets of the acquired, nothing was left to be divested except some obsolete machinery for which no buyers could be found;[5] and still another involving an important trademarked product, where the divestiture was limited to the plants without right to use the trademark, which the acquiring firm retained.[6]

In the face of this record it is not too much to say, as has Professor Donald Dewey, that while "the government wins the opinions . . . the defendants win the decrees." [7]

The only significant exception to this bleak remedial picture occurs in those relatively few cases in which the government has been able to obtain advance injunctive relief staying the merger pending resolution of the case. However, in the period of heavy merger enforcement, beginning in 1955 through 1971 the Department of Justice obtained a preliminary injunction in only 15 cases, while the FTC obtained such an injunction in only one case. In the limited number of cases in which the government moved for such injunctive relief, it was successful in obtaining a favorable judicial decision in only one out of three cases.[8] The district courts have varied in their receptivity to injunctive petitions by the government, but on balance have not been hospitable. The government has been put to a standard of proof akin to what it must meet at full trial and has frequently in addition been required to prove irreparable injury.[9]

The net effect of the above factors (the difficulty of securing injunctive relief to block the merger in advance and the weak remedies achieved afterwards) is a system in which the incentives against unlawful mergers are insufficient. As an economist has aptly described the situation: ". . . if there is no way of preventing a particular act before it is committed, and if there is no punishment (i.e. cost) for committing this act, if caught, *and* if it is profitable, them the act will continue to be practiced." [10]

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[3] K. Elzinga, *supra* at p. 52.
[4] Pfunder, Plaine & Whittemore, supra, 106.
[5] Id. at 57–59.
[6] Id. at 74–75.
[7] Quoted in Elzinga, supra, at p. 52.
[8] G. Lewis, *Preliminary Injunctions in Government Section 7 Litigation*, 17 Antitrust Bull. 1, 2-3 (1972).
[9] See G. Lewis, *supra*, and R. Schneiderman, *Preliminary Relief in Clayton Act Section 7 Cases*, 42 Antitrust L. J. 587 (1973).
[10] K. Elzinga, *Mergers: Their Causes and Cures*, 2 Antitrust Law & Econ. R. 53, 82 (1968).

Moreover, the courts, and often the government itself, have frequently been solicitous to ensure that the acquiring firm will suffer no loss, if not realize a positive gain, in disposing of the acquired stock or assets. Thus the incentives are skewed in the direction of merger even where there is a litigation risk.

An additional consequence is the incentive to hastily, and if possible secretly, consumate the merger, thereby precluding any possibility of preliminary injunction. Government representatives have testified over the years that their intelligence of prospective mergers is far from complete. A significant fraction occur without government knowledge.[11] The FTC Merger Reporting Program now ensures some advance government notice for mergers, but only the largest companies are covered by the requirement, and the notice may provide neither the time nor the information to obtain effective preliminary relief.

This is not to say that the anti-merger law has not been effective as a deterrent. Businessmen wishing to avert litigation or publicly spirited to comply with legal requirements have avoided entering into forseeably unlawful mergers, or have sought advance government clearance of planned mergers. Others, however, less scrupulous or knowledgeable, have entered into unlawful mergers and have frequently gained therefrom. As the enforcement agencies have been urging since 1956, this reflects a bias against careful and scrupulous business conduct that should be corrected.[12]

At the same time it is essential that any additional procedures not clog or seriously impede lawful merger or other non-offending business transactions. Mergers can be a source of efficiency and through the takeover device a means of giving added incentive to laggard management. Since the line between the lawful and unlawful in the merger field is often fuzzy, there is a tension between effective merger enforcement and minimum free market friction. My suggestions to the Subcommittee are aimed at achieving the best compromise between these two goals.

II. Evaluating the Specific Provisions of the Bill

I strongly favor the objectives of the premerger notification portion of S. 1284, but I believe those objectives can more wisely be achieved and with less friction to a free market economy with certain modifications. As stated, the grand object of the legislation should be to permit, so far as possible, the blocking of unlawful mergers without inhibiting those that are lawful. To this end it is necessary that the government (1) be informed of prospective mergers in advance, (2) be apprised of the pertinent facts surrounding the merger, and (3) be able to obtain relief which will be effective realistically in avoiding the anticompetitive consequences of unlawful mergers. The modifications I propose are designed to shorten the waiting period between notification and consummation of the merger, to take more directly into consideration the special timing and confidentiality problems of shareholder tender offers, to secure an adequate definition of the transactions and persons to be covered by the legislation, and to ensure effective, but not excessive, relief against unlawful mergers.

A. THE PREMERGER NOTIFICATION AND INFORMATION SECTIONS

1. The Notification Timetable.

Sections 23(a), (b) and (c) of the proposed bill establishes two separate notification requirements, one for larger mergers and a supplementary requirement, which the government is given discretionary authority to institute as to smaller mergers. In addition as to both types of mergers the government is authorized to require the submission of additional information and data, the effect of which will be to postpone the merger until after the information is produced.

As presently drafted these provisions would give the government the power to delay a merger for an extensive period. The government is authorized to serve a request on the merging parties for additional data without limitation as to length or complexity, and under proposed amendments to the Antitrust Civil Process Act also contained in S. 1284, this information could include both documents and testimony. Meanwhile, the merger is stayed until 30 days after the government serves notice that the material has been produced in full. The merging

[11] Testimony of Attorney General Brownell, in *Hearings on H.R. 264 and H.R. 2143, Antitrust Subcommittee of Comm. on Judiciary*, 85th Cong., 1st Sess. at 51 (1957); Testimony of Paul Rand Dixon, in *Hearings on H.R. 2882, H.R. 3563, H.R. 6058 and H.R. 6698 Before Antitrust Subcomm. of the House Comm. on the Judiciary, 87th Cong. 1st Sess at 100 (1961).*

[12] Testimony of Attorney General Brownell, *supra* at 52.

firms are protected from government foot dragging only by their right to institute a judicial proceeding to obtain a ruling that the government has unreasonably withheld its notification of completed production.

The possibility of such prolonged delay entirely at the discretion of the government could place a severe clog on free market transaction. Such delay could be imposed on mergers the government ultimately determines to be entirely lawful. Extensive delay of this type would all but preclude shareholder tender offers and upset most mergers where price was sensitive to market change. Thus, the Justice Department proposes an outside limit of no more than 120 days delay. But even four months is too long, and might block many, if not most, tender offers, where shareholders could hardly be expected to be willing to escrow their shares for this length of time.

I would propose that the bill be amended to adhere more closely to the timetable of previous merger notification bills, which limited the waiting period to 60 days.[13] This could be done by tightening the time limits for the government to make its request for additional information. As in the present bill the merging parties would have to notify the government 60 days prior to acquisition for Section 23(a) type mergers. Following notice the government would have only 25 days to make its request for additional information, and the merging parties would have the same time to respond. Thus on the 50th day following notice the government would have the augmented information it needs so far as the merging parties are able to supply it. Previous bills containing such a timetable, then gave the government only 10 additional days to evaluate the information, but I would suggest 30 days. Thus, the timetable would look like this:

	Day
Notification of merger	0.
Request by government for additional information	25th.
Response by merger parties to information request	50th.
Merger authorized	80th.

While the government might make a request for information from anyone having pertinent information, by formal or informal means, it would be of course authorized to delay the merger no more than 30 days following production by the merging parties (acquiring firm only if a contested takeover) of the requested information.

This not only shortens the timetable but makes the procedure more economical. It removes the possibility, contained in the Justice Department's proposal that the merging parties might frustrate careful evaluation of a merger by delaying their information response until the eve of the delay period expiration. It also eliminates the possibility of time consuming litigation over the adequacy of the merging parties response to the information request.

What leverage then does the government have to ensure that it obtains the information requested? The leverage is in its power to sue, which, as described below, would stay *pendente lite* certain kinds of mergers and subject all others to strict hold separate orders. Thus the government would have ample bargaining power to force compliance without necessity of preliminary litigation.

Interpretation of the notification requirements should be made with care not to impede tender offers to shareholders. As the Department of Justice suggests, this requires interpreting the tender offer as not itself being an acquisition, "directly or indirectly." Despite confidentiality provisions, discussed below, advance notice of a tender offer could well destroy the efficacy of the device. Premerger notification should follow the scheme of the Williams Act in which the notice to the government agency is given at substantially the same time as the tender offer.[14] Perhaps, a sentence in the Committee report should make the point clear that the tender offer is not in itself an acquisition under Section 23(a).

In addition, the bill or the legislative history, should direct the government to make every effort to contract the waiting period further in a tender offer situation.

2. Confidentiality of Merger Information

Stress has been laid on the fact, particularly in past hearings, that merger negotiations and plans are confidential and sensitive, and that publication even of the fact of planned merger is likely to upset the arrangement.[15] This is especially

[13] E.g. HR 7698, 85th Cong., 1st Sess.; Report of the Committee on the Judiciary, 85th Cong., 1 Sess. 14 (1957).

[14] 15 U.S.C.A. § 78n(d)(1).

[15] See Senate Rep. No. 2817, 84th Cong., 2d Sess. 9 (1956).

true with respect to shareholder tender offers. Yet as the Department of Justice has noted, no provision is made for treating as confidential the information supplied including the notice itself. It would seem desirable to include such a provision, as well as a further provision, contained in several of the prior bills, which would make disclosure by government officials of merger notification information punishable. The following language was contained in several of the past bills: "Any officer or employee of the [Federal Trade] Commission . . . or Department of Justice who shall make public any information furnished to the Commission . . . or Attorney General, unless directed by a court, or unless such information has already been made public, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court." [16]

In view of the extreme sensitivity and possible high value of some of the information, especially the notice of the merger itself, I see no reason why a similar provision should not be included in the present bill.

3. Defining the Transactions and Parties to be Covered

(*a*) *Covered Transactions.*—Much of the opposition to premerger notification legislation before this Subcommittee has had a familiar ring. As in the hearings in previous years, it has focused on the inappropriateness and burden of using language which would require notification of acquisitions of no antitrust relevance. One approach to this drafting problem is to attempt to enumerate in the statute a network of exemptions, and this was the approach often taken in past bills. One version in the 86th Congress listed as many as 15 separate exemptions; [17] and the Senate Judiciary Committee Report in the 84th Congress noted 17 possible exemptions.[18] In my judgment the attempt to make a complete list of exempted transactions was not only fruitless, but tended to bog down the proceedings. Since, it was impossible to list in advance every possible transaction that might lack antitrust significance, it was in all bills necessary to leave some exempting authority to the discretion of the enforcement agencies. At the same time a partial enumeration leaves in doubt unenumerated transactions ofc omparable importance.

Wisely the present bill avoids the enumeration approach but instead in Section 23(b)(4) gives to the enforcing agencies the full responsibility of establishing the exemptions, utilizing the more flexible procedures of administrative rule making. While the bill does not set forth the standard which should control in establishing such exemptions, it would seem apparent that the standard is that of Section 7 itself, i.e., whether the transaction is of the type which might be injurious to competition. Thus, ordinary buying and selling—the Chamber of Commerce's popsicle example [19]—would not be such a transaction while a joint venture normally would be included. The general standard of Section 7 could be restated in Section 23(a), for example, following the pattern of the Williams Act, which makes a similar grant of exempting power to the relevant agency,[20] but it would seem unnecessary since clearly Section 23(a) is to be construed as symmetrical with the underlying policies of Section 7.

(b) *Covered Persons.*—In its definition of persons made subject to the notification requirements the proposed bill is both broader and narrower than previous bills. It is broader in that it defines merging parties to include persons as well as corporations. It is narrower in that the minimum size of firms covered is larger.

The inclusion of natural persons and unincorporated entities is desirable. While not included in Section 7 such persons are clearly within the scope of the Sherman Act, which also covers anticompetitive acquisitions. Moreover, the specific inclusion of natural persons in regulatory legislation to control economic power is far from unprecedented. As far back as 1935 the Public Utility Holding Company Act defined a holding company required to register and report under the Act to include a natural or unincorporated person.[21]

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[16] S. 442 and S. 1005, 86th Cong., 1st Sess.; H.R. 9424 as amended by the Senate Committee on the Judiciary, 84th Cong., 2d Sess.

[17] S. 442, 86th Cong., 1st Sess.

[18] Senate Report No. 2817, 84th Cong., 2d Sess. 9–10 (1956).

[19] Statement of Chamber of Commerce, p. 50.

[20] The Williams Act in giving exempting power to the SEC from the tender offer requirements of the Act phrases the exemption standard as encompassing tender offers "as not entered into for the purpose of, and having the effect of, changing or influencing the control of the issues or otherwise as not comprehended within the purposes" of the statute. 15 U.S.C.A § 78 n(8)(C).

[21] 15 U.S.C.A. § 79b (a)(1).

The proposed bill is narrower than previous bills in that the sales/asset size test is considerably higher than the test in previous bills. Previous bills defined covered persons as those in which "the combined capital, surplus, and undivided profits" of the merging firms exceeded $10 million (a figure recommended by the Department of Justice and Federal Trade Commission).[22] Section 23(a) of the present bill would require merger notification only under the double condition that (1) the acquiring person has total assets or annual net sales exceeding $100 million *and* (2) either the acquired person has total assets or annual net sales exceeding $10 million *or* the combined assets or sales of the merging persons exceed $100 million.

While the size tests of the earlier and present legislation are not entirely comparable, since the earlier test appears to be limited to the equity portion of the assets, it still appears that the present bill would apply to considerably less firms. This is not necessarily a disadvantage, for no one would reasonably wish to burden business, and particularly smaller businesses, with unnecessary reporting requirements. Nevertheless, the dividing line for mandatory merger notification is a crucial one. The Congress has no means of ensuring notification enforcement below the mandatory reporting cut-off point. At the same time it is the smaller mergers of which the enforcement agencies are apt to be least aware; for it is these mergers that are most apt to escape the notice of the financial press—the government's chief source of knowledge. Finally, smallness of size is not necessarily to be equated with smallness of market share. For example, in one recent merger case a title insurance firm with only $7 million in assets was alleged to hold over 70% of the market in Missouri and Wisconsin and to be the eighth largest such company in the United States, while another company in the same case, the acquiring firm, with assets of something over $90 million, was alleged to be the second largest title insurance company, holding over 95% of the title insurance business of Illinois.[23]

The subject being important, how can the adequacy of the proposed sales/assets definition be tested? Two types of data seem at least relevant: (1) the extent of government prosecution in the size category, and (2) the extent of overall merger activity in the size category.

Turning first to the size of acquisitions actually challenged, Table 1 sets forth the asset size of the firms in the 45 merger complaints issued by the Federal Trade Commission in the period 1950 to 1961.[24]

TABLE 1.—PREMERGER NOTIFICATION, VALUE OF ASSETS ACQUIRED OR CONSIDERATION PAID BY COMPANIES INVOLVED IN 45 COMPLAINTS ISSUED BY THE FEDERAL TRADE COMMISSION

Acquiring company	Docket number	Assets of acquiring firm prior to first acquisition challenged in complaint	Assets of or consideration paid for acquired companies and properties at time of acquisition	Assets of the acquiring firm combined with the assets of or consideration paid for the acquired companies and properties
1. Pillsbury Mills, Inc.	6000	$61,528,000	$17,129,428	$78,657,428
2. Luria. Bros. & Co., Inc., et al	6156	(1)	(1)	(1)
3. Crown Zellerbach Corp	6180	343,000,000	15,223,754	258,223,754
4. Farm Journal, Inc.	6388	(2)	(1)	(1)
5. Union Bag & Paper Corp	6391	(2)	(3)	
6. A. G. Spalding & Bros., Inc.	6478	16,665,299	6,500,000	23,165,299
7. Foremost Dairies, Inc.	6495	15,812,655	[4] 103,204,184	119,016,839
8. Scovill Manufacturing Co	6527	36,738,006	1,583,738	88,321,744
9. Brillo Manufacturing Co., Inc.	6557	4,214,000	645,000	4,859,000
10. Scott Paper Co	6559	51,502,000	81,125,000	132,627,000
11. Fruehauf Trailer Co	6608	74,854,199	14,714,570	89,568,769
12. Vendo Co	6646	10,954,726	9,079,300	20,034,026
13. National Dairy Products Corp	6651	343,441,000	[5] 17,683,490	361,123,490
14. Borden Co	6652	259,024,011	[6] 18,491,018	277,515,029
15. Beatrice Foods Co	6553	45,233,000	[7] 21,232,349	66,465,349
16. Erie Sand & Gravel Co	6670	733,734	[8] 1,074,309	1,808,043
17. International Paper Co	6676	620,057,436	90,654,941	710,712,377
18. Gulf Oil Corp	6689	2,160,821,020	163,000,000	2,323,821,020
19. Automatic Canteen Co. of America	6820	19,031,660	13,652,758	32,684,418

See footnotes at end of table.

[22] H.R. Rep. No. 1889, 84th Cong., 2d Sess. 3(1956).
[23] United States v. Chicago Title and Trust Co., *Merger Case Digest—1967* (82—D.J.).
[24] *Hearings on H.R. 2882, 3563, 6058 and 6698 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 109-111 (1961).

TABLE 1.—PREMERGER NOTIFICATION, VALUE OF ASSETS ACQUIRED OR CONSIDERATION PAID BY COMPANIES INVOLVED IN 45 COMPLAINTS ISSUED BY THE FEDERAL TRADE COMMISSION—Continued

Acquiring company	Docket number	Assets of acquiring firm prior to first acquisition challenged in complaint	Assets of or consideration paid for acquired companies and properties at time of acquisition	Assets of the acquiring firm combined with the assets of or consideration paid for the acquired companies and properties
20. Union Carbide Corp	6826	1,459,748,000	33,309,000	1,498,057,000
21. National Sugar Refining Co	6852	43,026,832	21,955,952	64,982,734
22. Procter & Gamble Co	6901	688,272,623	12,629,425	700,902,048
23. Consolidated Foods Corp	7000	43,555,764	1,800,000	45,355,764
24. Reynolds Metals Co	7009	527,266,371	232,483	527,498,854
25. Dresser Industries, Inc., et al	7095	168,000,000	7,300,000	175,300,000
26. National Lead Co	7096	353,200,000	804,752	354,004,752
27. Diamond Crystal Salt Co	7323	8,966,902	4,022,120	12,989,022
28. National Tea Co	7453	82,519,736	[9] 35,497,457	98,017,193
29. Kroger Co	7484	24,492,262	[10] 41,949,846	66,442,108
30. ABC Vending Corp., et al	7652	16,715,607	5,893,813	22,609,420
31. Simpson Timber Co., et al	7713	69,678,000	45,964,000	115,642,000
32. Warner Co	7770	25,434,001	1,839,281	27,273,282
33. Crane Co	7833	224,100,000	65,657,345	289,757,345
34. Continental Baking Co	7880	96,321,684	13,560,953	109,882,637
35. Campbell Taggart Associated Bakeries, Inc	7938	83,795,088	[11] 17,554,279	53,349,365
36. Permanente Cement Co., et al	7939	74,916,030	[12] 1,425,000	76,341,030
37. Union Bag-Camp Paper Corp	7946	98,790,182	39,068,973	137,860,155
38. Minnesota Mining & Manufacturing Co	7973	153,275,000	20,967,500	174,242,500
39. Inland Container Corp., et al	7993	63,859,195	[6] 3,338,170	67,197,365
40. Kaiser Steel Corp	8027	448,650,000	4,822,148	453,472,148
41. Hooker Chemical Corp	8034	63,491,812	22,195,642	85,687,454
42. Ekco Products Co	8122	27,600,000	859,195	28,459,195
43. Leslie Salt Co	8220	22,196,935	1,247,745	23,441,680
44. American-Marietta Co	8280	41,628,826	112,761,649	154,385,475
45. Kaiser Industries Corp	8341	(13)	(13)	
Total		8,855,108,894	1,096,650,567	9,851,754,161

[1] Not available.
[2] Data in camera.
[3] Included in docket No. 7964.
[4] Includes the assets of 23 out of a total of 52 acquisitions; assets of 29 acquisitions not available.
[5] Includes the assets of 9 acquisitions; the consideration paid for 27; the par value of stock of 3, and the investment by National in 1 acquired company.
[6] Includes the assets of 31 corporate and 15 noncorporate acquisitions; includes the consideration paid for 22 noncorporate businesses, and the net worth of 1 noncorporate acquisition. No data could be tabulated on 11 acquisitions listed in the complaint.
[7] Includes the consideration paid for 135 acquisitions; the assets of 1; and the rental paid for 1 acquisition. No data available on 6 acquisitions.
[8] Value of consideration for assets acquired.
[9] Includes the consideration paid for 3 companies instead of assets.
[10] Includes the assets of 19 companies; the book value of 11 companies, and the approximate purchase price of 1 company. Assets were not available for 10 companies listed in the complaint.
[11] Assets of 3 acquired corporations not available.
[12] Additional assets valued at 2,295,600 English pounds sterling were involved.
[13] Assets included in docket No. 8027.

It appears that fully 29% of the FTC complaints would not have been reportable under the asset size test now included in Section 23 (a). If the alternative test proposed in these hearings by the FTC were adopted requiring that the combined sales/assets equal $250 million, 62% of the FTC complaints would fail to meet the test, at least in terms of assets. The percentage of unreportable complaints would appear to be less in recent years, but a quick check of a few of the current litigations still shows a not insubstantial amount of enforcement activity with respect to firms below the Section 23 (a) cut-off points. See Cases No. 99–FTC, 157–D.J. and 150–D.J. in MERGER CASE DIGEST—1971.

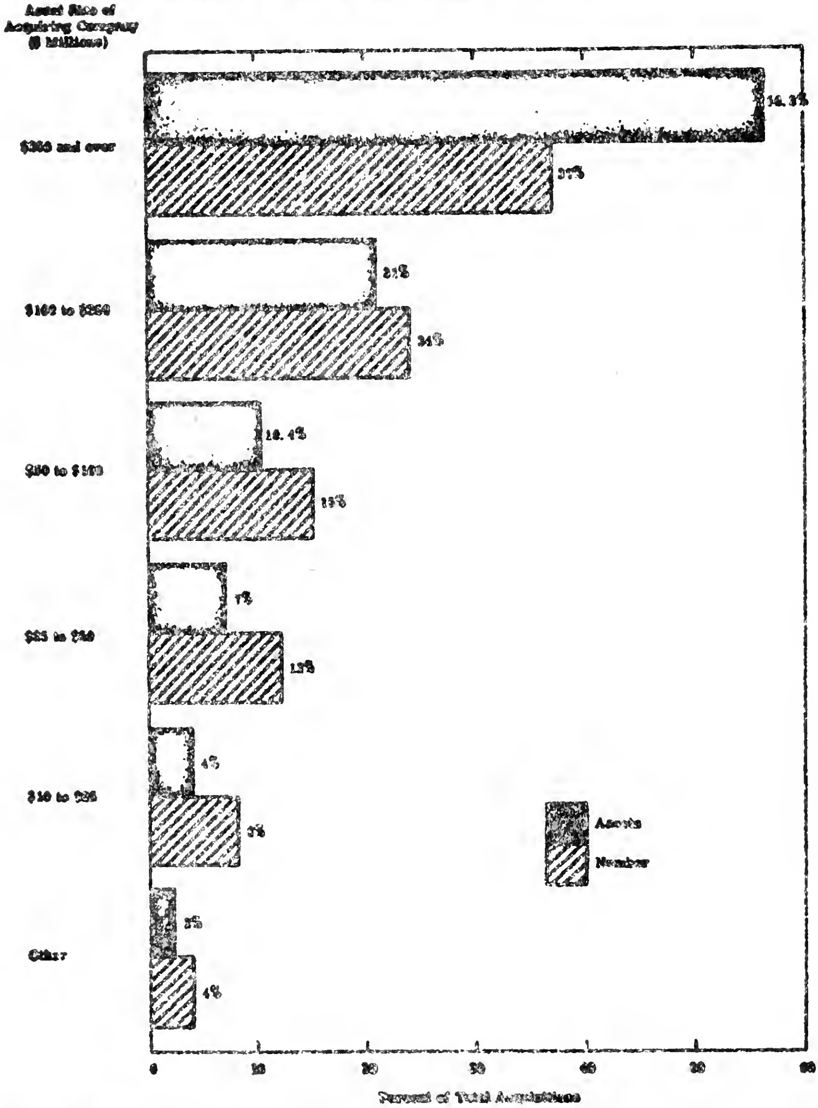
Turning now to the overall extent of merger activity, clearly there is a high volume of mergers involving smaller companies. In fact, numerically most acquisitions involve *acquired* firms of less than Section 23 (a) asset size while close to 40% of acquisitions involve *acquiring* firms of less than Section 23(a) asset size. Thus in 1968, of 2263 mining and manufacturing acquisitions, over 2000 involved companies which were probably under $10 million in assets, representing a minimum total value of $2.4 billion.[25] Even large companies are very active in making acquisitions of companies under $10 million. Thus 9 of 23 recent

[25] FTC Economic Report on Corportate Mergers 741 (1969).

acquisitions by Teledyne were in the \$5 to \$9 million asset category and 8 of 28 acquisitions by Litton Industries were in the same category.[26]

Figure 1-6

Acquisitions by Size of Acquiring Company, 1948-1968



Note: Includes all manufacturing and mining acquisitions of \$10 million or more.

Source: Bureau [illegible] Trade Commission. See Appendix Table 1-6.

Table 2 sets forth data on size of the acquiring firms. This indicates that in the period 1948–1968 fully 39% of all acquisitions were by firms having less than \$100 million in assets, and 24% were by firms with under \$50 million in assets.[27]

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[26] *Id.* at 548, 561-62. These, of course, would have been reportable under Section 23 (a).
[27] *Id.* at 672.

What light does the above data and other considerations cast on the difficult problem of drawing the sales/assets line for mandatory premerger notification? First, the limitation of the data must be recognized; they relate only to assets while Section 23 (a) is also framed in terms of sales, which in non-mining corporations will generally exceed assets. Second, the need for information is greatest with respect to smaller, anticompetitive mergers, for it is here that the government knows the least. Third, there has clearly been heavy merger activity, and enforcement effort, respecting mergers smaller than those included within Section 23(a). Fourth, figures as to government enforcement effort concerning smaller mergers are deceptive if the government was less likely to know of small company mergers. Finally, as an additional consideration the notification requirement need not in itself be burdensome or lengthy when there is also provision for serving a specific request for additional information.

The conclusions I draw from this are (1) There is no basis for raising the size of the sales/asset tests as the FTC suggests, for this would exclude a large fraction, if not most, of the mergers against which in the past the government has filed suit, and (2) there is some basis for moderately decreasing the present sales/asset tests. Specifically, I would suggest inclusion of the $5 million to $10 million size *acquired* firm, and the $75 million to $100 million size *acquiring* firm in Section 23(a) coverage."

B. THE STAY AND HOLD SEPARATE PROVISIONS

The bill repairs the remedial failure in the enforcement of the antimerger law in a simple and direct manner. It overcomes the reluctance of courts and enforcement authorities to procure effective relief following an adjudication of merger illegality by staying the merger until completion of the litigation. Thus, Section 23(d) provides that the enforcing authority need only certify that the public interest requires a stay and the district court is required to so order.

Without question this provision solves the problem of deficient relief. Final judgment against the merging parties would simply convert the stay into a permanent injunction. No unscrambling or reconstitution of the acquired firm or its assets would then be needed.

The problem comes with respect to what this would do to lawful mergers challenged by the government. The risk is that not just unlawful mergers, but all mergers whose consummation was stayed would be abandoned. While I have found little data on the question, two writers with practical experience, one an enforcement official of the Department of Justice, have suggested that merging partners have usually abandoned their proposed merger when the government has obtained a preliminary injunction.[28] This experience must be discounted by the fact that the few cases in which such injunctions have been granted were subject to a double screening by the Justice Department and the courts (the FTC has not sought preliminary injunctions) and therefore would presumably be those in which the illegality was clear and apparent. Nevertheless, the risk of deterrence of legitimate transactions, particularly as applied to take-over bids, cannot be dismissed. What I propose is that this risk be balanced against the antitrust risk, in devising an effective, yet workable, approach to the problem of remedy.

Such a balance can be achieved by differentiating, as a recent article suggests, between mergers which are horizontal and other types of mergers.[29] As to horizontal mergers, which present the gravest antitrust risk, I would follow the provisions of the Bank Merger Act of 1960—which also is aimed primarily at horizontal mergers. The Bank Merger Act provides that the filing of suit operates to stay the merger unless a court shall otherwise order;[30] and under the decisions of the Supreme Court and other courts, the court will not "otherwise order" unless it finds the government suit "frivolous" or "devoid of merit."[31]

The Department of Justice has urged a similar approach in these hearings. While supporting the issuance of a stay order on the filing of litigation, the Department would permit the court to lift the stay upon a showing of irreparable harm or arbitrary or capricious action. My proposal differs in adhering more precisely to the language of the Bank Merger Act and in being limited to horizontal mergers. Tracking the language of a successful statute, already available with settled

[28] G. Lewis, *Preliminary Injunctions in Government Section 7 Litigation*, 17 Antitrust Bull. 1, 7 (1972); R. Schneiderman, *Preliminary Relief in Clayton Act Section 7 Cases*, 42 Antitrust L. J. 587, 598 (1973).

[29] R. Schneiderman, *supra*, at 599-601.

[30] 12 U.S.C.A. §1828(c)(7).

[31] United States v. First City Bank of Houston, 386 U.S. 361 (1967); United States v. Citizens and Southern National Bank, 339 F. Supp. 1143, 1145 (N.D. Ga. 1972).

judicial interpretation, seems preferable to adopting new language the precise meaning of which must await future judicial construction.

The distinction in treatment I am suggesting as between horizontal and other types of mergers is based on a difference in immediate antitrust risk. It is vital that horizontal mergers be stayed at the outset of the litigation because the effects on competition are immediate and unavoidable. No hold separate order can prevent the management of the acquired firm from responding to the reality that its competitor, the acquired firm, may shortly be in full control of its board of directors.[32]

The antitrust risk is not comparable in vertical and conglomerate mergers. As Schneiderman suggests, the effects of these mergers are more likely to appear over time rather than immediately. On the other hand, if non-horizontal as well as horizontal mergers were subject to mandatory stay orders, the government would have the power to bar any shareholder tender offer it chose by the simple expedient of filing an antitrust suit. Whatever the chilling effect such a rule might have on mergers in general, it seems clear that it would discourage shareholder tender offers; for in any case in which a stay was issued, the tender offer would almost surely have to be abandoned, as it could scarcely be held in abeyance until completion of the litigation.

Balancing the lesser antitrust risk of non-horizontal mergers against the clogging effect on legitimate transactions, an adequate hold separate order, as provided in part by Section 23 (g) of the bill seems sufficient. Under such an order, the acquired firm or assets would be held separate and maintained as an independent, viable unit until the litigation is resolved. It would still be open to the government or private parties to seek a stay order under the traditional standards for preliminary injunctive relief if the merger is thought to be egregious. But no stay would issue as a matter of course.

Past history shows, however, that a hold separate order will not be sufficient in and of itself to ensure effective relief. Relief has often been deficient, even where hold separate orders existed, because of sale of the divested assets to an inappropriate purchaser, and antitrust abuse of the ownership relation is possible during the pendency of the litigation. Thus, additional injunctive provisions are needed, the most important of which would be a requirement that in the event of liability, divestiture must occur by spin-off or public offering.

It will *not* be feasible, however, under a hold separate order to prevent the exercise of control by the acquiring firm or their shareholders, and it would not be correct to do so since they are the present owners of the assets. The mandatory spin-off or public offering provision will preclude sale of the acquired firm or assets to an anticompetitive purchaser—to whom otherwise they are apt to be worth the most—and it will reduce the incentive to bleed or strip the firm, or to fail to maintain its full viability, since the residue must either be attractive enough for public offering or else be distributed to the firm's own shareholders. To make spin-off relief more feasible, it would be desirable to provide that in such a case the stock distribution to the shareholders would be taxable to them as capital gain and not as ordinary income (as was provided by statute in the *du Pont-General Motors* divestiture.)[33]

The principal disadvantage in making the initial relief turn on whether the merger is horizontal or non-horizontal is the problem of the classification itself. For the classification must rest on the definition of the market, often a complex question. If the matter must be resolved by a judge, a sticky trial issue is presented on a preliminary record. This would reintroduce the existing problem of the preliminary injunction where the court must make an assessment of the merits on an inadequate record.

The difficulty can be avoided, however, by a simple, and, I think, quite appropriate, expedient. The court would simply accord the same dignity to the government's classification of the merger as horizontal as it does to the government's assertion of its anticompetitive nature. Neither would be upset unless found to be frivolous or devoid of merit.

C. THE ESCROW OF PROFITS AND NO GAIN ON SALE PROVISIONS

The provisions of Section 23(g) dealing with consummated acquisitions are novel. They are intended to ensure that a successful attack on a consummated

[32] See R. Schneiderman, *supra*, at 599–601;
[33] 26 U.S.C.A. § 1111.

merger results in a decree which both restores the status quo and prevents the acquiring firm from making a profit on the divestiture sale. This result is achieved by requiring (1) maintenance of the acquired firm as a separate entity, (2) mandatory divestiture in the event of liability, (3) escrow of the earnings from the acquired stock or assets during the litigation, and (4) preclusion of any gain on the ultimate sale of the acquired stock or assets.

While the problems to which this provision is addressed are real, the solution proposed seems unwise and could well be counterproductive. A more limited alternative will be suggested below.

To begin with, if the other provisions of the premerger notification bill are adopted, including some version of Section 23(d) providing for a stay order *pendente lite*, the whole concept of Section 23(g) seems less necessary. The government will be given advance notice of mergers and the power in all cases (or in the more serious cases as I have proposed) to prevent consummation of the merger pending outcome of the litigation. Accordingly, there being no consummated merger, there is nothing to be divested, no profit to be escrowed and no gain to be prevented.

Thus, Section 23(g) would have application only as to old mergers (and newly consummated non-horizontal mergers under my suggestion). While I fully support hold separate orders, to the extent feasible, and mandatory divestiture, the escrow of profit and no gain on sale provisions of Section 23(d) seem excessive. Together the two provisions ensure a loss to the acquiring firm and its shareholders: their effect is to impose a zero return on the merger investment, which given alternative investment possibilities and inflation would result in a severe economic loss.

The harshness of the two provisions is manifest in their application to mergers consummated before the law was enacted. As to these, they would operate as a pure retroactive penalty; they could scarcely serve as an incentive to prevent mergers that have already occurred.

As for future mergers against which the government does not bring suit prior to consummation (or under my proposal as to vertical and conglomerate mergers as well), the provisions seem equally undesirable. These mergers are apt to fall in areas of law where the legality of the merger tends to be fuzzy, rather than sharp and decisive. A penalty as to mergers not predictably unlawful seems unfair. Moreover, it would operate as a general deterrent against mergers lawful and unlawful, thereby unnecessarily clogging free market transactions.

Beyond this, the measure might well prove counter-productive in one of its basic objectives, restoring competitive conditions, since the acquiring firm, unable to realize any gain on the divesture sale would have little incentive to preserve the full profit-making potential of the acquired company or assets. Finally, the presence in the bill of such a novel, seemingly harsh provision might endanger the general support for the long sought premerger notification.

As an alternative, however, as mentioned in the previous section of this statement, I would suggest retention of the hold separate and mandatory devestiture provisions of Section 23(g),[34] with the added requirement that the divestiture be by spin-off to the acquired firm's shareholders or by public offering. While a court would be permitted to depart from this requirement, particularly in the case of old mergers, it should only be on extraordinary good cause. For reasons stated earlier, this form of relief is the best means of restoring the competitive framework existing before the merger. Some provision might have to be made where there was a spin-off to the shareholders of an acquiring firm with concentrated stock ownership, but adequate means can be devised to protect the independence of the new firm under such circumstances. Perhaps all these considerations could be met by providing that such relief is to be given if at all feasible.

Special Masters and Other Experts in Complex Cases

Section 21 of the proposed bill is designed to improve the handling of the so-called "big antitrust case." Limited to non-jury civil cases, it permits the Attorney General to certify that a case is a "complex antitrust case." The effect of such a certification is to put the district court under the duty to expedite the case. And to this end authority is given to disignate special masters, economic experts, "and other personnel" in order "to assist the trial judge in the expeditious and efficient trail of the case, and in expediting discovery and pre-trial matters."

[34] Such relief may not always be feasible, however, as in the case of a previously consummated merger in which the assets have been scrambled.

What exactly is the legal effect of these provisions? The general design is clear enough. Section 21 gives to non-jury civil antitrust cases a priority they do not have now, but seeks to ensure that this priority will not be at the expense of other important matters by attempting to give the judge ample authority to obtain assistance. But how much does this add to the authority the judge already possesses?

As for the use of economic experts, it appears that the language is confirming of what is already a large range of discretionary judicial power. Although language can be found referring to the need for judicial restraint in utilizing court-appointed experts,[35] such caveats do *not* cite decisions where the judicial discretion has been upset.[36] Still, the language in the bill would remove any doubt there may be as to the power of the court to utilize experts. It would seem particularly desirable to permit free use of economic and other appropriate experts in the remedy stage of antitrust trials, where the level of the proceedings has often not been up to the level of the trial in chief.

It is unclear whether the use of experts would be permitted *in camera*, as for example the economist "law clerk" used by Judge Wyzanski in the *United Shoe* case.[37] This seems inadvisable, as the parties have no way of correcting mistaken or biased advice given in the privacy of the judicial chambers. Thus it should be made clear that all reports or advice of court-appointed experts is to be available to the parties and subject to rebuttal and generally cross-examination.

The judge is also given authority to utilize "other personnel," but it is unclear what these words mean. Presumably, such other personnel include para-professional and clerical help. If so, there is surely no objection to the judge making use of this kind of assistance, which the lawyers before him are employing in increasing numbers.

The major difficulty, and I suspect the real controversy, with respect to Section 21, comes over the use of special masters. This provision must be compared with the present language of Federal Rule 53(b), which provides in pertinent part: "A reference to a master shall be the exception and not the rule. . . . [I]n actions to be tried without a jury, save in matters of account, a reference shall be made only upon showing that some exceptional condition requires it."

As interpreted in the leading antitrust decision on the use of special masters, *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), neither complexity of antitrust litigation nor calendar congestion constitutes the "exceptional condition" which alone under the rule would permit designation of the master. And reaching beyond the particular facts of the case, subsequent constructions of *LaBuy* have read the decision as placing severe restriction on any use of masters in antitrust cases.[38]

A sharp distinction must be drawn between the use of a master in the trial of the case and use in discovery and pretrial. *LaBuy* and most of the other antitrust cases that have criticized use of special masters, involved a reference to the master of the entire trial (as in *LaBuy*) or of some significant portion of the trial.[39] On the other hand, the use of masters in pretrial and discovery has generally been approved. As Wright and Miller point out, this was a practice that antedates the Federal Rules, which were designed to incorporate, not repeal the previous practice.[40]

The use of special masters in lieu of a judge on trial issues has had a spotted legal history and is contrary to the general American legal tradition that a litigant is entitled to have his case tried before a judge.[41] Moreover, it would be difficult indeed to demonstrate that special masters would do a better job in trying antitrust cases than district judges; and whatever the fact might turn out to be, some defendants would surely feel they were being deprived of their full day in court.

There is less difficulty in urging the use of special masters for what judges are *not* doing. A busy district court cannot normally give the kind of close attention to the supervision of the discovery and pretrial program that a special master

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[35] Manual for Complex Litigation § 3.40, at 98 (1973).
[36] *Id.* at 98-102.
[37] *See* C. Kaysen, *United States v. United Shoe Machinery Corporation* (1956).
[38] *Manual for Complex Litigation*, § 3.20, at 92 (1973); Arthur Murray, Inc. v. Oliver, 364 F.2d 28 (8th Cir. 1966).
[39] Arthur Murray, Inc. v. Oliver, 364 F.2d 28 (8th Cir. 1966); *See also* Adventures in Good Eating v. Best Places to Eat, 131 F.2d 809 (7th Cir., 1942); (not an antitrust case).
[40] C. Wright & A. Miller, 9 *Federal Practice and Procedure* § 2601, at 777 (1971); I. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 *Colum. L. Rev.* 452, 454 (1958).
[41] I. Kaufman, supra, at p. 453.

able to devote substantial time can give. The judge cannot, unless relieved of other duties, preside over pretrial dispositions or study with great care the myriad of discovery and pretrial issues. Thus, special masters could here be used to help the judge manage and expeditiously handle the preliminary stage of the case. It is in the performance of these tasks that the testimonials have been sung over the use of special masters.

Thus Judge Kaufman wrote with respect to three protracted cases which he examined:

"I found that the appointment of a special master resulted in an overwhelming saving of the court's time and labor. Without the master, if supervision was undertaken by one judge it would have been physically impossible for him to maintain his regular court assignments. Even if he were not required to devote the same amount of time to the case as the master had done (including in one case 350 days of hearings alone), adjudication of other actions on the already congested calendar would have been materially delayed.

"Of even greater value was the constant day-in, day-out supervision by the master and the great familiarity with the case he was able to acquire as a result. For this reason, proceedings could be conducted in a most informal manner, and stipulations and agreements not otherwise possible could be achieved. Because of the master's great familiarity with the case he was able at times to make rulings over the telephone. . . . This constant availability of the master for on-the-spot rulings drastically reduced the number of motions brought into the motion part, thus saving the parties an incalculable amount of time in preparing motion papers and briefs, arguing in the motion part, and awaiting a judge's decision." [42]

There is another advantage that a master enjoys, to quote Judge John Dooling, then a distinguished antitrust practitioner:

"There is also an advantage in the quality of supervision of discovery under a special master. Ordinarily, this will be the sole judicial or quasi-judicial business that the lawyer chosen as the special master has. To him it will be his one continuing interest in a judicial matter and he will bring to it a continuity of knowledge that a judge, even in the court in which cases are assigned to single judges, can not do. When a judge deals interruptedly with discovery matters, as they arise out of depositions taken out of his presence, he has a task of recollecting. He must put himself back into that case, sometimes during intervals in his other judicial business, when his mind is charged with many other judicial matters." [43]

It is sometimes claimed that a reference increases litigation costs, but if the master can shorten discovery, he more than earns his fee. As Judge Kaufman recounted:

"Perhaps the most oft repeated criticism of the reference procedure is that it adds appreciably to the cost and length of litigation. Though it may be conceded that added costs must be initially borne by the parties, counsel in the three cases I have had an opportunity to examine indicated that such charges are more than compensated by the dispatch in which the cases were finally readied for trial."[44]

Appointment of a special master for discovery and pre-trial does not mean that the judge loses all contact. The judge continues to supervise, participates in formulating a pre-trial order and receives regular reports from the master on the progress of discovery.[45] The judge is thus able to develop some acquaintance with the case, while reserving his heavy time investment for crucial pre-trial formulation of issues, the trial and the development of the remedy. The result, as Judge Kaufman has suggested, is likely to be (1) better preparation of the case for trial, (2) increased chance of early settlement, and (3) accelerated discovery and shortening of time before trial.[46]

I would suggest, therefore, that the language of Section 21 be revised so as to provide that special masters may be used to assist the trial judge in expediting discovery and pretrial matters, but not in connection with the actual trial of the case. Section 21 would then be consistent with Rule 53(b) in its implicit codification of the prior practice of using special masters in discovery and pre-trial and its prohibition of their use on trial issues except in unusual circumstances. It

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[42] I. Kaufman, *supra* at 466–467: See also R. Marsh, *Pre-Trial Discovery in an Anti-Trust Case*, 8 Record 401, 411 (1953).

[43] J. Dooling, *Cooperation Between Counsel in Simplifying Protracted Cases*, 23 F.R.D. 460, 465 (1959).

[44] I. Kaufman, *Use of Special Pre-Trial Masters in the "Big" Case*, 23 F.R.D. 572, 581 (1959); *see also* J. Weinstein, *Standing Masters to Supervise Discovery*, 23 F.R.D. 36 (1959); but cf. C. Clark, *Difficulties Encountered in a System of Masters*, 23 F.R.D. 569 (1959) (refers to use of masters for trial).

[45] Id. at 583.

[46] Id. at 578.

would be useful to so provide for it would remove any doubt on the propriety of use of pre-trial masters due to the failure of Rule 53(b) to explicitly approve their use; it would remove any negative implications the *LaBuy* decision may have cast; and finally it would preclude occasional lower court decisions that have upset pretrial designations.[47]

The Bayh Amendment

Senator Bayh proposes to amend the Sherman Act (1) to include deliberately exclusionary practices by firms not possessing monopoly power, and (2) to drastically increase the monetary penalties for violating the Sherman Act. Although both proposals respond to real concerns, I believe neither would be desirable at this time.

The first proposal expands the attempt to monopolize offense to firms of all market size, not just those possessing monopoly power. This proposed change has been exhaustively analyzed in a recent article by Professor Cooper in the Michigan Law Review.[48] After considering the matter at length Professor Cooper concludes that there are "grave dangers" in any such expansion of the law, that efficiencies may be lost, desirable business conduct forbidden, and a general uncertainty of judicial outcome might widely deter even the most desirable forms of business rivalry. Indeed, in another recent article, in Harvard Law Review, Professors Turner and Areeda question the competitive wisdom of condemning predatory pricing, a classic exclusionary practice, even when undertaken by firms having monopoly power.[49] The reason again is because of the extreme difficulty in attacking such practices without impinging gravely on the competitive process.

In another, perhaps deeper sense the proposal is unwise, for it would interrupt the long tradition of placing primary reliance on case by case development for the expansion of antitrust doctrine. This slow, but steady evolution has served antitrust well. The growth of expanded substantive rules in this complex field is best done in the context of the detailed facts of specific proceedings.

The other Bayh proposal would require the forfeiture by any corporation violating the Sherman Act of up to 20% of its gross revenues, excluding only lines of commerce "wholly unrelated" to the violation. This bears some resemblance to a recent proposal by Professors Breit and Elzinga in Harvard Law Review.[50] The resemblance is only superficial, however, for the Bayh proposal is quite different. Economists Breit and Elzinga were concerned about the inefficiency and high transaction costs involved in the treble damage penalty and sought to substitute a more efficient means of deterrence. Thus, the heavy fine to be imposed was *in lieu* of private damages. The Bayh proposal is to impose such a fine *in addition to* existing penalties. Indeed, it is to be attached to a bill strengthening the rights of the states to bring treble damage actions.

There are other differences between the two proposals. The Breit and Elzinga proposal was made at a time when the maximum fine for Sherman Act violation was still only $50,000 and did not constitute a felony. The Breit and Elzinga proposal also called for forfeiture of 25% of a firm's *profits*, not its *gross revenues*, for they did not wish to place the existence of the firm in jeopardy, which a penalty based on gross revenues might well do. And Breit and Elzinga would have imposed the penalty across the entire firm, not just the lines of commerce related to the violation, for they did not wish a penalty which would have been harsher to the single product than to the multi-product firm.

There is much to be said for the idea of relying on heavily enhanced corporate fines to induce lawful antitrust behavior, in place of current remedies. But proper consideration of such a large change requires a careful study of the whole range of penalties and enforcement incentives. This should be the subject of a separate hearing devoted to that purpose.

Senator Hart. The hearing is adjourned until Thursday, June 26. At that time, it is anticipated it will be the closing of the hearing

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[47] See e.g., Wilver v. Fisher, 387 F. 2d 66 (10th Cir. 1967) (not an antitrust case).

[48] *Attempts and Monopolization: A Mildly Expansiony Answer to the Prophylatic Riddle of Section Five*, 72 Michigan L. R. 373 (1974).

[49] P. Areeda and D. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. R. 697 (1975).

[50] W. Breit and K. Elzinga, *Antritrust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 Harv. L. R. 693 (1973).

schedule. The senior Senator from Nebraska, Mr. Hruska, will be in the Chair.

I think I should indicate that, following that hearing, we will provide some additional days during which additional statements and comments could be submitted to the subcommittee for the record.

Thank you very much.

Mr. CHUMBRIS. Thank you, Mr. Chairman.

[Whereupon, at 4:30 p.m., the proceedings were adjourned, to reconvene to hear two witnesses on June 26, 1975. Due to the press of Senate business, the hearing was rescheduled to July 9. On July 8, the two witnesses scheduled to appear agreed to submit written statements for the record, and the hearings and record were closed. The statements referred to follow:]

PREPARED STATEMENT OF WILLIAM SIMON ON BEHALF OF AMERICAN COLLEGE OF TRIAL LAWYERS REGARDING THE PARENS PATRIAE PROVISIONS OF S. 1284 SUBMITTED TO SUBCOMMITTEE ON ANTITRUST AND MONOPOLY OF THE SENATE COMMITTEE ON THE JUDICIARY

The American College of Trial Lawyers is a national organization of trial attorneys, each of whom is admitted to practice before the highest court in his state and has been engaged in trial practice for at least fifteen years. Among the objectives of the College is "to improve and enhance the standards of trial practice [and] the administration of justice. . . ." [1]

The College has taken an active interest in the administration of complex litigation, and, in particular, the effectiveness of class litigation pursuant to amended Federal Rule 23. In 1972, the College's Special Committee on Rule 23 of the Federal Rules of Civil Procedure issued a Report,[2] which evaluated the performance of Rule 23 based on actual experience since the 1966 amendments to the Rule. The College Report was critical of the Rule as it had been applied in some large consumer and stockholder class actions, and made recommendations designed to further the Rule's as yet unrealized goals of economy in judicial administration and uniformity of result without sacrifice of procedural fairness.[3]

In its continued interest in the sound administration of complex litigation, the College has directed its Committee on Rule 23 and Multidistrict Litigation to review the *parens patriae* provisions of S. 1284 and its counterpart, H.R. 6786 and to comment on the legal and practical problems raised by the proposed legislation.

In presenting these comments, the College reemphasizes its support for the sound economic and legal policy underlying the federal antitrust laws. The College has in the past supported, and continues to support, vigorous enforcement of the antitrust laws, compensation for injured parties and the imposition of effective penalties for violations. The College subscribes to the view that the treble damage provisions of Section 4 of the Clayton Act are an effective means of private enforcement and a deterrent to violations. And, the College fully supports the objectives of the proposed amendments as recited in the preamble, "to improve and facilitate the expeditious enforcement of the antitrust laws."

The proposed amendments, however are a radical departure from the common law concept of *parens patriae* and undermine the long standing policy of private antitrust enforcement. They authorize state Attorneys General to expropriate the claims of individual citizens and to impose multiple penalties for a single violation which are unrelated to actual damages and which would greatly exceed what is necessary for deterrent purposes. The proposed amendments would give legislative sanction to the worst deficiencies of massive class litigation, would be highly inefficient and would be an unfair method of antitrust enforcement. With-

[1] Article II, By-Laws of the American College of Trial Lawyers.

[2] American College of Trial Lawyers. *Report and Recommendation of the Speciol Committee on Rule 23 on the Federal Rules of Civil Procedure* (1972) (hereinafter referred to as the "College Report"). The College Report has been cited with approval in subsequent Court decisions. *E.g., LaMar* v. *H & B Novelty & Loan Co.*, 489 F. 2d 461, 468 n. 19 (9th Cir. 1973); *Eisen* v. *Carlisle & Jacquelin*, 479 F. 2d 1005, 1018-19 nn. 24 and 25 (2d Cir. 1973); *aff'd on other grounds*, 417 U.S. 156 (1974).

[3] Advisory Committee's Note, 39 F.R.D. 98, 102-03 (1966).

out even the limited safeguards of Rule 23, the *parens patriae* suits authorized by the amendments would impose upon the limited resources of federal courts the unreasonable burden of massive and totally unmanageable litigation, would violate due process rights of both claimants and defendants and would not be of any significant benefit to individual consumers. And because of the unreasonably coercive *in terrorem* effects of such ltiigation, penalties would be imposed in most cases without any adjudication of guilt. The College therefore opposes the enactment of the *parens patriae* amendments.

PARENS PATRIAE SUITS FOR DAMAGES SUSTAINED BY INDIVIDUAL CITIZENS WOULD VIOLATE THE PARTIES' CONSTITUTIONAL RIGHTS, WOULD IMPOSE UNREASONABLE BURDENS UPON THE FEDERAL JUDICIAL SYSTEM AND WOULD NOT SIGNIFICANTLY BENEFIT INDIVIDUAL CONSUMERS

Section 4C(a)(1), providing for *parens patriae* actions by a state Attorney General in a United States District Court to recover damages sustained by persons residing in his state, is an attempt to circumvent restrictions on unmanageable consumer class actions imposed by the courts under Rule 23. By sweeping away the standards and procedures established by the Rule without establishing any new guidelines, the amendments raise substantial constitutional issues and threaten to inundate the federal courts with inherently unmanageable and totally unnecessary consumer actions.

The bill provides that a judgment in an Attorney General's *parens patriae* suit would be res judicata to the claims of all state residents who do not affirmatively exclude themselves. (Section 4(c)(b)(2)) The fifty state Attorneys General are authorized, therefore, to expropriate the causes of action of their state's residents without due process of law. While Section 4C(b)(2) provides residents an opportunity to "opt out" of the suit, such a right is of little solace to the majority of residents who would never receive notice of the action because of the ineffective notice by publication authorized by the bill. Moreover, unlike Rule 23, the bill would not permit residents to intervene by counsel of their choice to protect their interests or to be heard on the propriety of any proposed settlement.

Many of the residents whose causes of action would thus be expropriated would be individuals and business entities with substantial individual claims, who in the past have vigorously enforced the antitrust laws. *E.g.*, *Atlantic City Electric Co.* v. *I-T-E Circuit Breaker Co.*, 247 F. Supp. 950, 951 (S.D.N.Y. 1965). Sound public policy as well as due process dictates that the claims of individual citizens, many of whom surely will have conflicting interests in the outcome of the litigation, should not be summarily transferred to the states.[4]

Section 4C(b)(1) directs the Attorney General, within thirty days of filing a *parens patriae* suit, to publish notice in whatever manner authorized by the state's statutes in court rules or, in the absence of such a statute or rule, by whatever manner prescribed by the District Court. This provision is objectionable in several respects. First, the notice standards would vary significantly among the states, creating confusion and inconsistency among the federal courts. Second, there is no provision for court approval or supervision of these notice procedures. Third, the District Courts are given unbridled discretion in states which do not, by statute or court rule, provide for notice.

Most significantly, in directing notice by publication even where the identity of the individual claimants is known, the bill violates the well-established principle that due process requires that individual mailed notice—not merely notice by publication—be given to each identifiable person whose interests are to be affected by litigation. *See Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). Although *Eisen* was a Rule 23 class action, the Court emphasized the constitutional basis for its ruling, relying upon the earlier decisions in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Schroeder* v. *City of New York*,

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[4] Similar constitutional and public poilicy considerations underlie the historical limitation of *parens patriae* suits to the protection of the general welfare of a state's citizens as a whole, and not merely the representation of the individual interests of its citizens. Thus, *parens patriae* suits have been allowed only for these claims, which, but for the federal union, would be settled by diplomacy or warfare. *Missouri* v. *Illinois*, 180 U.S. 208 (1901); *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1882); Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 Nw. U.L. Rev. 193, 209 (1970). In *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945), the Court upheld Georgia's right to seek injunctive relief under the antitrust laws, based upon a finding that the allegations of discrimination against Georgia constituted a form of trade barrier, and therefore consistent with the traditional *parens patriae* right of action. (324 U.S. at 450) The proposed amendments would be a radical departure from the state's traditional *parens patriae* role.

371 U.S. 208 (1962). Indeed, the Rule 23 notice provisions were specifically drafted to insure compliance with the due process principles set forth in these cases. See Advisory Committee's Note, 39 F.R.D. 69, 107 (1966). Since *parens patriae* suits would adjudicate claims of citizens not before the court as parties, the individual notice mandated by due process must be provided.

Any action which attempts to adjudicate the claims of large numbers of individuals presents serious questions of judicial manageability. The draftsmen of Rule 23 sought to minimize these difficulties by providing that class actions be permitted only where questions of law or fact common to the class predominate over individual questions and where the District Court finds that a class action is superior to other means of resolving the controversy. While subject to ligitimate criticism, the Rule provides some protection against the inundation of the federal court system with unmanageable class litigation by providing that a class action may proceed only if judicially manageable.

The proposed *parens patriae* amendments would authorize the joinder of the individual claims of millions of citizens in a single suit without any standards for protecting the rights of the parties or preserving the integrity of the judicial process. Precisely this problem led the Supreme Court to reject the *parens patriae* concept in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972). Although the District Court had rejected Hawaii's proposed statewide class of consumers as unmanageable, Justice Marshall noted the possibility of sustaining a more manageable class and concluded:

> *Parens patriae* actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area. Rule 23 provides specific rules for delineating the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries. (405 U.S. at 266).[5]

The upsurge in class litigation since the 1966 amendment of Rule 23 has imposed substantial burdens on the federal judiciary. See College Report at 13–15. The proposed amendments would greatly aggravate these burdens. We, therefore, suggest that the Congress solicit the views of the United States Judicial Confefence as to the manageability of *parens patriae* suits and their effect on the administration of justice in the federal courts.

There is little likelihood that the proposed amendments would achieve their apparent purpose of facilitating the recovery of damages by individual ultimate consumers. In most instances, the state's residents who have sustained damages from an antitrust violation would be manufacturers, processors, wholesalers or others in the chain of distribution between the violator and the ultimate consumer, who are perfectly capable of protecting their own interests. The Supreme Court decision in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) establishes that the first purchaser in the distribution chain who has paid an illegal overcharge may recover treble damages based upon the entire amount of the overcharge irrespective of whether he resold the product at a price which incorporated the overcharge. The only exception would be where the first purchaser sets his resale price pursuant to a cost-plus contract. Subsequent decisions have held that in order for an ultimate consumer to establish injury caused by an antitrust violation, he must prove that the overcharge was passed on at each level of the distribution chain pursuant to a cost-plus contract or its equivalent.[6] Since this is impossible in the vast majority of cases, it would be a rare circumstance when an ultimate consumer could prove that he has sustained an injury caused by an antitrust violation unless he purchased directly from the guilty party.

Experience with large user class actions demonstrates that such actions are of no significant benefit to allegedly injured individuals and that class members have little or no interest in these suits. In most instances, the cost of preparing and processing even the most rudimentary proof of claim will exceed the potential recovery.

Even after settlement, when a damage fund has been created and class members can recover merely by filing a simple proof of claim form, they have shown minimal interest in such cases. Experience in many class actions confirms Judge

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[5] Similar concerns led to the rejection of proposed *parens patriae* actions in *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1057, 1063 (E.D. Pa. 1969), *app. dism'd* (3d Cir., Feb. 2, 1970).

[6] *E.g.*, *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub nom. Mangano* v. *American Radiator & Standard Sanitary Corp.*, 438 F. 2d 1187 (3d Cir. 1971) (per curiam); *Donson Stores, Inc.* v. *American Bakeries Co.*, 58 F.R.D. 481 (S.D.N.Y. 1973).

Lumbard's conclusion that all too often "the only persons to gain from a class suit are not the potential plaintiffs, but the attorneys who represent them." [7] For example, a review of the docket in *City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45 (D. N.J. 1971) reveals that notice of the settlement was sent to 21,291 non-governmental class members, but only 1,716 responded: 976 of those persons opted out of the class and only 740 (or approximately 3%) of the class members filed claims. Notice was also sent to 1,045 governmental bodies of which 8% filed claims, 231 opted out and the others did not respond. In fact, 414 governmental agencies, which would have shared in the settlement fund without even filing a claim, notified the District Court that they did not wish to participate. Despite this lack of interest in litigation demonstrated by members of the class, the attorneys for the class were awarded fees of $6 million.

Balanced against this minimal benefit to individual consumers is the deprivation of the procedural and substantive rights of the parties in massive consumer class litigation. In Rule 23 actions, courts have distorted substantive law by eliminating the element of impact, or fact of injury, from the private treble damage action, or have based their finding of manageability on the underlying assumption that the *in terrorem* effect of such massive litigation will coerce settlement irrespective of the merits of the claims.[8] By authorizing state Attorneys General to sue to recover damages allegedly sustained by thousands or even millions of citizens without even the limited restraints of Rule 23, Section 4C(a)(1) would give added impetus to these improper and unfair practices.

The present rule is that a plaintiff allegedly damaged by an antitrust violation must establish (1) the existence of a violation; (2) that the violation had an impact on him, or that he was in fact injured as a direct result of the violation, and (3) a measurable amount of damages. For example, in a horizontal price fixing case, even if the existence of a conspiracy is established, there must be a showing that each damage claimant purchased the product involved, that the product was sold by a defendant at a price which included the illegal overcharge and that the overcharge had not been absorbed by any level in the distribution chain intervening between the claimant and the violator, but had been passed on by each. *See Hanover Shoe Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968); College Report at 17–18. Obviously, proof of the impact of a violation on each resident of a state would immobilize a federal court for years, and *parens patriae* suits could be managed only by distorting sound legal principles and eliminating the requirement of proving impact.[9]

Indeed, the bill itself would eliminate the impact requirement. In Section 4C(c)(1), it is provided that an Attorney General "may recover the aggregate damages sustained by the persons or political subdivisions on whose behalf the state sues without separately proving the individual claims of each such person or political subdivision." This section is apparently intended to authorize the use of the fluid class recovery theory—a theory which was rejected by the Second Circuit in *Eisen* as unconstitutional—in which proof of a violation and the total amount of damages to a class of claimants would be determined at a single trial. Once a state Attorney General had established the existence of an antitrust violation, no individual claimant would be required to come forward to establish either the impact of the violation on him or the amount of his damages. Rather, the damage recovery would be based on testimony from accountants or economists who would estimate the average amount of the overcharge per unit of the product involved, resulting from the violation, and the number of units of the product sold to citizens of the state. The classwide damage fund would then be calculated by multiplying the number of units sold by the amount of the overcharge. Injured citizens would then be afforded an opportunity to make claims against the damage fund with the unclaimed portion to be used for the purpose authorized by state law or for "general welfare purposes."

In authorizing the use of fluid recovery in litigated cases, the proposed amendments would give legislative sanction to the ill-conceived experiments by two District Courts in the litigated *Antibiotics* cases and the *Eisen* case. *In re Anti-*

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[7] *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 551, 571 (2d Cir. 1968) (dissenting opinion); *see also In re Hotel Telephone Charges*, 500 F. 2d 86, 91 (9th Cir. 1974); *Free World Foreign Cars, Inc.* v. *Alfa Romeo S.p.A.*, 55 F.R.D. 26, 30 (S.D.N.Y. 1972).

[8] *See* College Report at pp. 15–20.

[9] The Supreme Court has emphasized the higher standard of proof requirement for the fact of damage element. *See Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931):

> It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner has sustained some damage, and the measure of proof necessary to enable the jury to fix the amount.

biotics Antitrust Actions, 333 F. Supp. 267 (S.D.N.Y. 1971); *Eisen* v. *Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971), *rev'd*, 479 F. 2d 1005 (2d Cir. 1973) (*Eisen III*), *aff'd on other grounds*, 417 U.S. 156 (1974).[10] These two experiments were rejected by the Second Circuit Court of Appeals in *Eisen III*, which held fluid recovery to be "an unconstitutional violation of the requirement of due process of law" and "illegal, inadmissible as a solution to the manageability problems of class actions and wholly improper." (479 F. 2d at 1018) Fluid recovery has been rejected by every other federal court which has considered its use in a litigated antitrust context. *In re Hotel Telephone Charges*, 500 F. 2d 86, 90 (9th Cir. 1974); *Al Barnett & Son, Inc.* v, *Outboard Marine Corporation*, 64 F.R.D. 43, 55 (D. Del. 1974).

The fluid recovery procedure is objectionable in antitrust litigation on several grounds. First, defendants would be deprived of their fundamental due process right to confront and challenge before a jury each person asserting claims against them. Second, once the necessity of establishing the fact of each claimant's injury and amount of damages is eliminated, any damage award would be unrelated to the actual damages sustained and would be unreasonably punitive. Third, many of those residents who actually sustained injury as a direct result of a violation would not be compensated while the use to which the state applies what will undoubtably be the greatest portion of the damage fund would benefit many residents who had not been injured by the violation. Finally, if those residents who do make claims against the fund are held to traditional standards of proof, the suits would impose an unmanageable burden on the courts since these individual damage claims could number in the thousands even if as few as 1% of a state's residents sought compensation.

It is unlikely that the proposed *parens patriae* suits will result in the trial and adjudication of antitrust violations. In the period of almost nine years since the amendment of Rule 23, no large consumer class action had been litigated through trial to a determination of damages. The enormous litigation expenses and undefined but potentially massive damages awards, often in excess of the defendants' net worth, have forced defendants to seek the insurance policy of a "global" settlement of all potential claims, irrespective of the merits of the claims. The pressure to settle comes in part from judges who are understandably reluctant to undertake the "harrowing experience" [11] of the trial of thousands or millions of individual claims, and the realization that practical necessity will require the use of novel theories and procedures and the erosion of procedural and substantive standards. Professor Handler has labelled such massive representative actions as "legalized blackmail," [12] and the Second Circuit Court of Appeals has adopted his criticism:

> [P]reliminary procedures . . . and the huge and unavoidable expense of producing witnesses and documents pursuant to discovery orders, have brought such pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits of the claim.
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> There is reason to believe that the practical effect of these procedures, and the fact that possible recoveries run into astronomical amounts, generate more leverage and pressure on defendants to settle, even for millions of dollars, and in cases where the merits of the class representative claim is to say the least doubtful, than did the old-fashioned strike suits made famous a generation or two ago by Clarence H. Venner. (Footnotes omitted)[13]

The coercive effect of *parens patriae* suits would be even greater. The states would not be faced with the hurdle of class certification, and there would be no requirement of court approval of any settlement. Potential damage awards would be totally speculative and virtually without limit since the awards would not be related to actual injury. And, because of the elimination of substantive and procedural safeguards, the prospects of successful defense would be uncertain, irrespective of the merits of the claims.

Based on actual experience with massive class litigation, the College has recommended reforms in the administration of Rule 23 class suits, concluding:

> The (b)(3) class suit has mandated heavy expenditures of judicial time, effort and expense. The expenditures have been sustained only by sacri-

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[10] Fluid class recovery had originated in the administration of the settlement in the *Antibiotics* cases. *West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F. 2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

[11] *Morris* v. *Burchard*, 51 F.R.D. 530, 536 (S.D.N.Y. 1971).

[12] Handler, The Shift from Substance to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review, 71 Col. L. Rev. 1, 9 (1971).

> ficing procedural and substantive fairness to the party opposing the class. Nor does it appear that these burdens can in any sense be justified by the limited benefits accruing to class merits. (College Report at 6)

The *parens patriae* suits authorized by Section 4C(a)(1) would carry forward and magnify the most serious deficiencies of massive Rule 23 class litigation.

Section 4C(a)(1) also provides that, as an alternative to a *parens patriae* action, the District Court may permit an Attorney General to proceed as a resresentative of a class of residents of the state. The purpose and effect of this provision is unclear. Presumably, such a class action would be subject to Rule 23—in which case the provision is superfluous since the prerequisites of Rule 23 must be satisfied. However, the provision might be interpreted as carving out an exception to the Rule's requirements with respect to class actions brought by a state Attorney General—an exception which would be totally unwarranted. In order to avoid confusion and the litigation which would be engendered, this provision should be deleted.

Section 4C(a)(3) is also ambiguous. It provides simply that a state Attorney General may bring an action on behalf of any or all political subdivisions of the state. Such a suit is not designated as a *parens patriae* action. If such an action is to be brought as a Rule 23 class action, the section is unnecessary since an Attorney General can bring such an action presently so long as the requirements of Rule 23 are satisfied. On the other hand, read literally the section gives state Attorneys General the authority to sue on behalf of political subdivisions as named party plaintiffs. As such, it represents an unjustified feredal intrusion into the affairs if the states and would conflict with many state constitutional and statutory provisions which define the relationship between the state Attorneys General and the political subdivisions. The authority to sue in the name of political subdivisions and the designation of the lawyer to represent them are clearly matters which should be left to state law. In any event, this ambiguous provision inevitably will give rise to confusion and litigation; it should be deleted.

PARENS PATRIAE SUITS FOR DAMAGES TO A STATE'S GENERAL ECONOMY WOULD PRESENT INSOLUBLE PROBLEMS OF PROOF AND WOULD CONTRAVENE ESTABLISHED STANDING PRINCIPLES

Section 4C(a)(2), provides for *parens patriae* suits to recover "damages to the general economy of [the] State or any political subdivisions thereof," Presumably, it is intended to overrule *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972) in which the Supreme Court rejected Hawaii's claim for damages to its "general economy and prosperity." However, the proposed amendment does nothing to solve serious substantive and procedural problems underlying the *Hawaii* decision.

First, an award in a *parens patriae* action necessarily would be based upon an accumulation of the damages of the state in its proprietary capacity and of its individual citizens, thereby giving rise to duplicative punitive recoveries for the same injury. In *Hawaii*, the Court found this problem precluded the State's action:

> A large and ultimately indeterminable part of the injury to the 'general economy', as it is measured by economists, is no more than a reflection of injuries to the 'business of property' of consumers, for which they may recover themselves under § 4. Even the most lengthy and expensive trail could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State. (405 U.S. at 264)

S. 1284 attempts to address this problem with a proviso that damages recovered pursuant to the section shall not be duplicative of those recovered in *parens patriae* or class suits brought pursuant to Section 4C(a)(1). However, the impact of any antitrust violation on the general economy of a state is an amorphous and abstract concept which is incapable of measurement other than by cumulating injury to individual citizens. And, as Justice Marshall pointed out, it is beyond the capacity of the trial process to segregate injury to the economy from the damages of individual citizens. Section 4(c)(a)(2), therefore, would create a remedy which will

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[13] *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1019 (2d Cir. 1973), *aff'd on other frounds*, 417 U.S. 156 (1974); *see also Yaffe* v. *Detroit Steel Corp.*, 50 F.R.D. 481, 483 (N.D. Ill. 1970); *Shaffner* v. *Chemical Bank*, 339 F. Supp. 329, 337 (S.D.N.Y. 1972); College Report at 15-16.

be impossible to achieve, but certainly would give rise to confusion and extensive litigation.

Second, it would be impossible to devise rational standards under which the issue of injury to the general economy could be submitted to a jury for resolution. Mere proof of an antitrust violation would not necessarily mean that a state's general economy was adversely affected—and certainly would not provide a means for measuring that effect.

Under traditional standards of proof, it would be utterly impossible to demonstrate a causal link between an alleged violation and such economic indicators as industrial output or employment trends which might be offered as a measure of the general economy. In rejecting Hawaii's *parens patriae* claim, the Court of Appeals for the Ninth Circuit stated:

> In light of Hawaii's inability yet to articulate a more precise theory or measure of such damages, we are skeptical of the existence of an independent harm to the general economy. The general economy is an abstraction. It has no value itself. . . . It exists only as a reflection of the business or property values it represents. (*Hawaii* v. *Standard Oil Co.*, 431 F. 2d 1282, 1285 (9th Cir. 1970))

Parens patriae suits have in the past been limited to actions for injunctive relief. [14] Unlike actions at law for damages, injunctive actions are not subject to trial by jury, and therefore there has been no need to undertake the impossible task of devising standards of measuring damages to the general economy for submission of the issue to the jury. Moreover, equitable decrees look only to the future and establish guidelines for future action. Any speculative award for damages for injury to the general economy for past acts would be unreasonably punitive and unjust.

The history of *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945), the only case in which a *parens patriae* antitrust action has been approved by the Supreme Court, documents the difficulty in proving injury to the general economy. Georgia sought injunctive relief based upon injury to its general economy from allegedly discriminatory rates set by the defendant railroads. Georgia did *not* seek compensatory treble damages on it *parens patriae* claim under Section 4 of the Clayton Act because of the impossibility of calculating damages to its general economy. After extensive proceedings before a master, Georgia was unable to establish even the fact of injury to its economy, and the Supreme Court dismissed the petition. (340 U.S. 88 (1950)) Professor Freund of Harvard characterized the results as follows:

> Whatever strategic end may have been achieved through early overruling of a motion to dismiss (324 U.S. 439), the complete inability of the state to make good its claim of injury as parens patriae suggests that in the future the Court may be more wary of sweeping allegations of detriment to a state's economy as a basis of a case or controversy. Book Review, 3 J. Legal Ed. 643, 644 n. 2 (1951).

Georgia's difficulties in establishing the fact of injury in an equitable proceeding would be magnified many times over in a *parens patriae* suit pursuant to Section 4C(a)(2) in which a state would be required to prove both the fact and amount of injury. Congress should not establish a cause of action for damages which are incapable of proof, and in which any award would be totally speculative and punitive without any relation to actual injury.

Finally, the creation of a *parens patriae* action for damage to the general economy would upset established rules which limit standing to sue for antitrust violations to those directly injured by the violation or those within the so-called "target area", or the area of the econony at which the alleged violation was aimed. The general economy of a state would be far beyond the target area of any alleged antitrust violation and any injury thereto would be indirect and consequential. Lack of standing to sue was an alternative basis for the Ninth Circuit's rejection of the *parens patriae* claim in *Hawaii.* (431 F. 2d at 1285)

Although the Courts of Appeals have developed somewhat varying rules as to standing, all such rules are based on the sound public policy of preventing unreasonably punitive multiple recoveries for the same injury and the inundation of the federal courts with suits predicated upon the remote economic effects of a violation. The Court of Appeals for the Second Circuit stated the rationale in

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[14] *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1057, 1058 (E.D. Pa. 1969), *app. dism'd* (3d Cir. 1970); Malina & Blechman, *Parens Patriae Suits for Damages Under the Antitrust Laws*, 65 Nw. U.L. Rev. 193, 213 (1970).

Billy Baxter, Inc. v. *Coca-Cola Co.*, 431 F. 2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) as follows:

> While any antitrust violation disrupts the competitive economy to some extent and creates entirely foreseeable ripples of injury which may be shown to reach individual employees, stockholders, or consumers, it has long been held that not all of these have the requisite standing to sue for treble damages and thereby take a leading role in the enforcement of the prohibition in question.
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> . . . The private action . . . can only serve as an effective deterrent if the courts are able to administer it with some degree of certainty. Contourless rules of causation would pose the threat of a parallel relaxation of the standard of business behavior enforced by the allowance of treble recovery. (431 F. 2d at 187; citations omitted)

And in *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F. 2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) the Court stated:

> . . . if the flood-gates [of antitrust standing] were opened . . . the lure of a treble recovery, implemented by the availability of the class suit as facilitated by the amendment of Rule 23 F.R.C.P., would result in a overkill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress. If the antitrust laws were precise and crystallized something might be said in favor of such an enormous expansion of potential treble damage liability, speculative as the damages might be. But the fact remains that because there are few 'bright lines' in the area, even experts who have devoted their entire professional lives to practice of antitrust law often find it impossible to advise a client with any degree of certainty whether his contemplated conduct will transgress lawful bounds. (Footnote omitted)

Congress should carefully consider the wisdom of overturning these established principles governing the proper scope of the antitrust damage action. Damages to the general economy would be purely speculative, would duplicate recoveries by the injured parties, would be remote and unforeseeable, and, in our judgment, would have little or no deterrent effect.

CONCLUSION

Under existing antitrust statutes, violations have recently been made felonies and the criminal sanctions increased to imprisonment for up to three years and fines of up to \$1 million for corporations and \$100,000 for individuals. Private parties can recover three times their actual damages plus costs and attorneys' fees. In recent years the states, utilizing Rule 23 and the multidistrict consolidation pursuant to 28 U.S.C. §1407, have been increasingly active in seeking damages in their proprietary capacity and on behalf of their political subdivision and citizens. And the Department of Justice, the states and private parties can seek injunctions against future violations—the relief which most directly benefits individual consumers.

No showing has been made of any deficiencies in the present enforcement arsenal to justify the unreasonably punitive provisions of the proposed *parens patriae* amendments. The amendments would permit multiple damage awards totally unrelated to actual injury, and, given the practicalities of massive litigation, in most cases without any adjudication of guilt. And, while attention to date has been focused on hard core violations such as horizontal price fixing conspiracies, these penalties would apply equally to violations such as vertical distribution restraints, price discrimination and mergers, in which courts have recognized there are few "bright lines" between legal and illegal business practices. The amendments would, therefore, delegate to state political officials the authority to recover penalties for alleged violations of federal law far in excess of those which the Department of Justice can recover. In a word, the proposed amendments represent unjustified overkill.

Use of fluid recovery and the authorization of suits for incalculable damages to a state's general economy represents a fundamental shift of antitrust policy from compensation of injured parties to imposition of penalties which are totally unrelated to the damages caused by the violation. While presumably intended to insure that no antitrust violator is allowed to retain the fruits of his offense, the amendments overlook the threshold step of proving that a violation has, in fact, been committed. Rather, the bill is based on the premise that each defendant named in an antitrust suit is guilty of the violations charged—a totally unfounded and impermissible assumption.

As one distinguished federal judge has commented on the deficiencies of Rule 23—the most serious of which would be incorporated in *parens patriae* suits:

> Something seems to have gone radically wrong with a well-intentioned effort. Of course, an injured plaintiff should be compensated, but the federal judicial system is not adapted to affording compensation to classes of hundreds of people with $10 or even $50 claims. The important thing is to stop the evil conduct. For this injunction is the appropriate remedy, and an attorney who obtains one should be properly compensated by the defendant, although not in the astronomical terms fixed when there is a multi-million dollar settlement. If it be said that this still leaves the defendant with the fruits of past wrongdoing, consideration might be given to civil fines payable to the government, sufficiently substantial to discourage engaging in such conduct but not so colossal as to produce recoveries that would ruin innocent stockholders or, what is more likely, produce blackmail settlements. This is a matter that needs urgent attention. H. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

If present antitrust enforcement is deemed inadequate, certainly there are additional enforcement mechanisms which would be less burdensome to the federal judicial system and would preserve the rights of both defendants and injured citizens. The College respectfully urges that Congress, in its consideration of the proposed *parens patriae* amendments, take into account the deficiencies we believe to be inherent in the proposed legislation.

Prepared Statement of Robert A. Longman, Chairman, Antitrust Section, New York State Bar Association on S. 1284 (the "Antitrust Improvements Act of 1975")

I am Robert A. Longman, Chairman of the Antitrust Law Section of the New York State Bar Association. Our section consists of 1,255 members of the New York State Bar who practice in the antitrust field, representing a broad cross-section of individuals, agencies and businesses, who may at any time be plaintiffs or defendants in antitrust proceedings. Because time did not permit circulation of these remarks to the entire section, they represent only the consensus view of the Executive Committee of our section, some of whose members have had long and extensive experience in Government service in the enforcement of the antitrust laws prior to their antitrust practice as members of the private bar. It is not the general policy of our Committee to comment on proposed legislation. However, we have closely followed S. 1284 and are of the opinion that we have an obligation to comment, since the Bill is far reaching in its scope and will, if enacted, have a substantial impact upon the application of the antitrust laws. We support portions of the Bill, but believe that other portions of the Bill are inappropriate and should be revised or deleted.

Title I of S. 1284 outlines the "findings" of Congress and the policy, based in those "findings", which underpins the Act. We submit that many of the findings are actually assumptions which may not be correct.[1]

We seriously question whether sufficient inquiry has been made concerning the relationship between oligopoly and competition, and between present levels of competition and the problems of inflation and unemployment, to support the findings contained in Title I.[2]

We submit that a thorough inquiry might cause the Congress to conclude that there is intense competition in many concentrated industries, that in many industries there has been no reduction in the level of competitive behavior in the United States, and that factors unrelated to industry structure and competitive behavior contribute to inflation and unemployment. For example, it is very possible that inflation and unemployment are in part problems of an international nature,

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[1] Subsection (a)(2) declares that there has been a decline of competition in industries in which oligopoly power exists and that this decline has contributed significantly to unemployment, inflation, inefficiency, under-utilization of economic capacity, a reduction in exports, and an adverse effect upon the balance of payments. Subsection (a)(6) contains some of the same assumptions. Subsection (a)(3) declares that diminished competition and increased concentration have been important factors in the ineffectiveness of monetary and fiscal policies in reducing the high rates of inflation and unemployment. Subsection (a)(5) alludes to investigations which have identified excessive concentration and anticompetitive behavior in various industries. Subsection (b) includes among the purposes of the legislation the "restoration" of competition in the marketplace and the prevention and elimination of oligopoly power.

[2] The investigations mentioned in Subsection (a)(5) are limited in scope and do not support the broad and conclusive "findings".

caused in part by monetary, wage-price and balance of payment policies of the United States and foreign governments which are designed to secure domestic full employment at the expense of other nations, but which, in the aggregate, hinder normal workings of the U.S. and world economies and cause the problems they were intended to cure.

We suggest that Title I be revised to state simply that the purpose of the Act is to help further assure that the national policy of free, open and vigorous competition will be preserved.

Our Committee generally supports Title II which grants broader antitrust investigative authority to the Department of Justice and should enable it to enforce the antitrust laws more effectively. However, we suggest one specific change.

Among the many provisions of Title II is a provision which permits an antitrust investigator to exclude from an oral examination (during investigation) all persons other than the person being examined, his counsel, the officer before whom the testimony is taken, and the stenographer.[3] We believe that fairness requires that the antitrust investigator be required to give reasonable written notice of such examination to each party under investigation and permit such party, and counsel, to be present, have an opportunity to cross-examine and obtain a copy of the transcript of the testimony.

In the absence of such change, the Bill will permit antitrust investigators to keep parties in the dark during the investigatory stage concerning the testimony which may support the potential allegation of violation of law. Fairness requires that a party inderstand the potential allegation, so that he may have the opportunity to explain why the allegation has no factual basis, negotiate a settlement prior to litigation with some appreciation of the relative strength of the Department of Justice's position, or prepare an appropriate defense.

We generally support Title III which provides increased penalties for failure to obey special orders or subpoenas of the Federal Trade Commission, but question whether it is fair or appropriate (i) to establish a minimum penalty of $1,000 per day, and (ii) to start the running of the penalty period fifteen days after notice by the Federal Trade Commission of default in filing the report or obeying the order.

The increase in the penalty from $100 per day to a maximum of $5,000 per day should furnish additional incentive to comply with FTC special ordes orr subpoenas. Inclusion of the minimum penalty will work a hardship in those cases (however small in number) in which there is a reasonable explanation for failure to comply. We recommend that the minimum penalty be deleted and that the courts be permitted to exercise judgment as to the penalty in each case, not to exceed a maximum of $5,000 per day.

Title III would start the penalty period running fifteen days after notice by the Federal Trade Commission of default in filing the report or obeying the order, subject only to the right of a party to obtain a court order staying the accumulation of penalties upon demonstrating a substantial probability of ultimate success on the merits, irreparable damage, and that the equities clearly favor a stay. It will be extremely difficult for any party to satisfy the burden of proof necessary to stay the accumulation of penalties. Under such circumstances, faced with mounting penalties, a party will have no practical choice but to comply.

We recognize that the present law is not sufficiently strong, in that it permits parties to delay the commencement of the penalty period by appealing from the orders of district courts. We feel, however, that a party should be given a day in court before the penalty period starts to run and suggest that the Commission be required to obtain a district court order, upon a showing by the Commission of the reasonableness of the request, and that the penalty period should run from the date of the district court order.

We have reviewed carefully the statement Milton Handler presented to this Subcommittee on June 3, 1975 and endorse his well reasoned criticism of Title IV, the parens patriae section, which permits State attorneys general to file antitrust actions on behalf of citizens and the general economies of their states.

The provision which permits suits for damage to the "general economy" is completely inconsistent with prior legislation and case law which permits suits suits only by those who have been injured in their "property." The courts will struggle, without success, to determine the appropriate metes and bounds of "general economy" and will ultimately impose arbitrary judgments whenever

[3] Proposed Section 3(k)(1) of The Antitrust Civil Process Act.

they ignore the traditional requirement of injury to property. There is no evidence that the requirement of injury to property has deprived any party of damages for injuries which that party has, in fact, suffered. The "general economy" concept will provide a windfall to states which we do not believe the Congress should intend to give.

For much the same reasons, we also agree with Professor Handler's criticism of the provision in Title IV which allows aggregate estimated damages to be imposed without proof of specific injury.

We object to the provisions in Title IV which deprive an individual party of the right to proceed on his own unless the party files an intention to proceed within thirty days of published notice of the parens patriae action. This provision apparently assumes, incorrectly, that all potential plaintiffs will be aware of the published notice of the parens patriae action, and also assumes that each potential plaintiff will be able to complete within thirty days the complex analysis which may be required before the party can know whether he will be best advised to proceed on his own (i.e., "opt out" of the parens patriae case) or be represented by the State attorney general. Suppose, for example, a potential plaintiff has been injured in his business throughout the United States and becomes aware that attorney general of one State has decided to proceed as parens patriae on behalf of the citizens of that State. How will that party decide within thirty days whether he wants his claim in one State to be represented by an attorney general?

On balance, we believe that the parens patriae section will cause many more problems than it will solve. We recommend that it be deleted from S. 1284.

Title V, the premerger notification section, would require parties of the modest size described in Section 23(a) to delay the consummation of a merger during the required notification and waiting period described in Section 23(b)(1) and will permit either enforcement agency to block such merger during the notification and waiting period by commencing a proceeding or action during such period and certifying to the district court "that it or he believes that the public interest requires relief pendente lite . . ." These provisions depart radically from present law which does not automatically delay mergers and which requires that the enforcement agency obtain a court order if it wishes to enjoin consummation of the merger. Our Committee is of the opinion that the proposed changes are misguided and should not be made.

The requirement that all mergers of the size described in Section 23(a) be delayed during a waiting period overlooks the fact that most mergers are lawful under the anti-merger statute and that the government agencies only attack mergers in a small number of cases.[4] An arbitrary waiting period will inhibit the free flow of capital in a depressed economy. We question whether there will be a significant increase in the number of blocked mergers under the proposed Bill and whether the advantages to be gained would outweight the deterrent to lawful mergers which the waiting period would provide.

The provision which enables an enforcement agency to obtain an injunction by certifying to the district court that it or he believes "that the public interest requires relief pendente lite" substitutes for the reasoned judgment of a court the belief of the enforcement agency. It will result in the enjoining of many mergers which courts would not enjoin. As a practical matter, many mergers which are lawful and would otherwise take place will be abandoned when an injunction is issued on the basis of the belief of the enforcement agency. Rather than engage in extensive litigation to determine whether they can consummate a merger which has been enjoined pendente lite, we believe that most companies (particularly small companies) will decide to devote their energies to other matters and abandon the merger. Does it make sense to give companies an incentive to abandon lawful mergers merely because the enforcement agency believes that the public interest requires relief pendente lite?

Under present law, as stated by Judge Friendly of the U.S. Court of Appeals for the Second Circuit, motions for preliminary injunctions "require a balancing of public and private interests of various sorts". *Missouri Portland Cement Company v Cargill, Incorporated* 498 F.2d 851, 854 (2d Cir.) *cert. denied*, 43 U.S.L.W. 3213 (October 15, 1974). A vast majority of acquisitions today are conglomerate acquisitions, i.e. not horizontal or vertical, and in such cases, as Judge Friendly

[4] In 1972 and 1973, companies with assets in excess of $100 million made 281 and 753 acquisitions, respectively; and 73 and 137 companies with assets in excess of $10 million were acquired. *Statistical Report: FTC Report on Mergers and Acquisitions.* During 1972 and 1973 the Department of Justice filed 17 and 13 complaints, respectively, and the FTC commenced 7 and 7 proceedings, respectively, with respect to mergers (including those in regulated industries).

states, "there are 'strong reasons for not making the prohibitions of section 7 so extensive as to damage seriously the market for capital assets, or so broad as to interfere materially with mergers that are pro competitive . . .' ". (p. 854) Until now Congress has left it to the courts to distinguish between good and bad mergers and we strongly urge that the courts be permitted to continue that function pursuant to a body of law which has developed over 85 years and particularly since 1950. Maintenance of a free market for capital assets is essential in the long run to combat inflation; to that end, it is important that more efficient companies be permitted to acquire the less efficient unless the acquisition threatens to transgress our antitrust standards, *i.e.* unless the acquisition may substantially lessen competition or tend to create a monopoly (Clayton Act, Section 7).

Subsection (g) of Title V requires the court to enter an order requiring the acquiring person or persons to maintain the personnel, assets, stock or acquired firm as a separate entity pending the outcome of an FTC proceeding or Justice Department action with respect to the legality of the acquisition under Section 7 of the Clayton Act or Sections 1 or 2 of the Sherman Act. Courts presently have the authority to order such separation of the acquired firm in appropriate cases. We question, however, whether separation should be mandated by law and suggest that the present more flexible approach be retained.

We agree with the views expressed to you by Thomas Kauper, Assistant U.S. Attorney General in charge of the Antitrust Division of the Justice Department, and by Lewis Engman, Chairman of the Federal Trade Commission, to the effect that Subsection (g) of Title V is too inflexible in mandating complete divestiture of all unlawful mergers at a price not to exceed the purchase price. In addition to the reasons outlined by them, we raise the question whether there will be a sufficient incentive to operate an acquired company efficiently and introduce improvements if there is the clear prospect of complete divestiture at no more than the original price if the case is lost. The provision may engender "holding pattern" operations during litigation and be anticompetitive in nature.

We agree with the views of the Justice Department expressed to you by Thomas Kauper in opposition to the provisions of Title VI which would allow a plea of *nolo contendere* in an antitrust proceeding to be used as prima facie evidence in subsequent private treble damage actions. We cannot add to the compelling arguments against the provision which Mr. Kauper has brought to your attention.

Title VII would, among other things, extend the reach of the Clayton Act to activities "affecting commerce." We support the change insofar as it applies to Sections 3 and 7, but question whether it should be extended to Section 2 at this time. Consistency with the recent amendment of the Federal Trade Commission Act to reach transactions affecting commerce calls for similar amendment of Sections 3 and 7 of the Clayton Act.

We question, however, whether the reach of the Robinson-Patman Act (Section 2 of the Clayton Act) should be so extended at this time. The Robinson-Patman Act is basically a soft-competition statute which is not enforced by the Department of Justice and recently has been only sparingly enforced by the Federal Trade Commission. The Department of Justice is presently studying the Robinson-Patman Act, with a view to making possible suggested changes. It might be more appropriate to re-examine the Robinson-Patman Act in its entirety, rather than amend the Act in this piecemeal manner.

Title VII also provides that in any action involving any act to regulate interstate or foreign trade or commerce, or to protect the same against unlawful restraints or monopolies, in which the court orders any party, or person in privity thereto, to furnish discovery, evidence or documents, and such party or person refuses on the ground that foreign law prohibits compliance with such order, the court may dismiss all or some of such party's claims or defenses or otherwise terminate the proceeding or any portion thereof adversely to such party. This provision appears to constitute a knee-jerk reaction to foreign statutes which prohibit disclosure of information or documents. If there is a quarrel with the foreign law, the appropriate course to effectuate change is through discussion at the political or enforcement levels. Nothing is accomplished by victimizing a party who cannot furnish evidence or documents by reason of a foreign law which prohibits the furnishing of such evidence or documents. We respectfully recommend that the provision be deleted.

We endorse the comments made to you by Professor Handler in opposition to the amendment to S. 1284 recently proposed by Senator Bayh. In particular, we object strenuously to Senator Bahy's proposal that any corporation guilty of a Sherman Act violation forfeit to the United States Treasury 20% of its gross revenues during the period of such violation. This proposal is confiscatory in nature, may well be unconstitutional, and goes far beyond any penalty which is appropriate to assure adherence to the antitrust laws.

ROBERT A. LONGMAN,
GEORGE J. WADE,
SANFORD M. LITVACK,
JOSHUA F. GREENBERG,
WILLIAM T. LIFLAND,
GEORGE D. REYCRAFT,
ASA D. SOKOLOW,
JAMES R. WITHROW, Jr.,
Executive Committee.

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